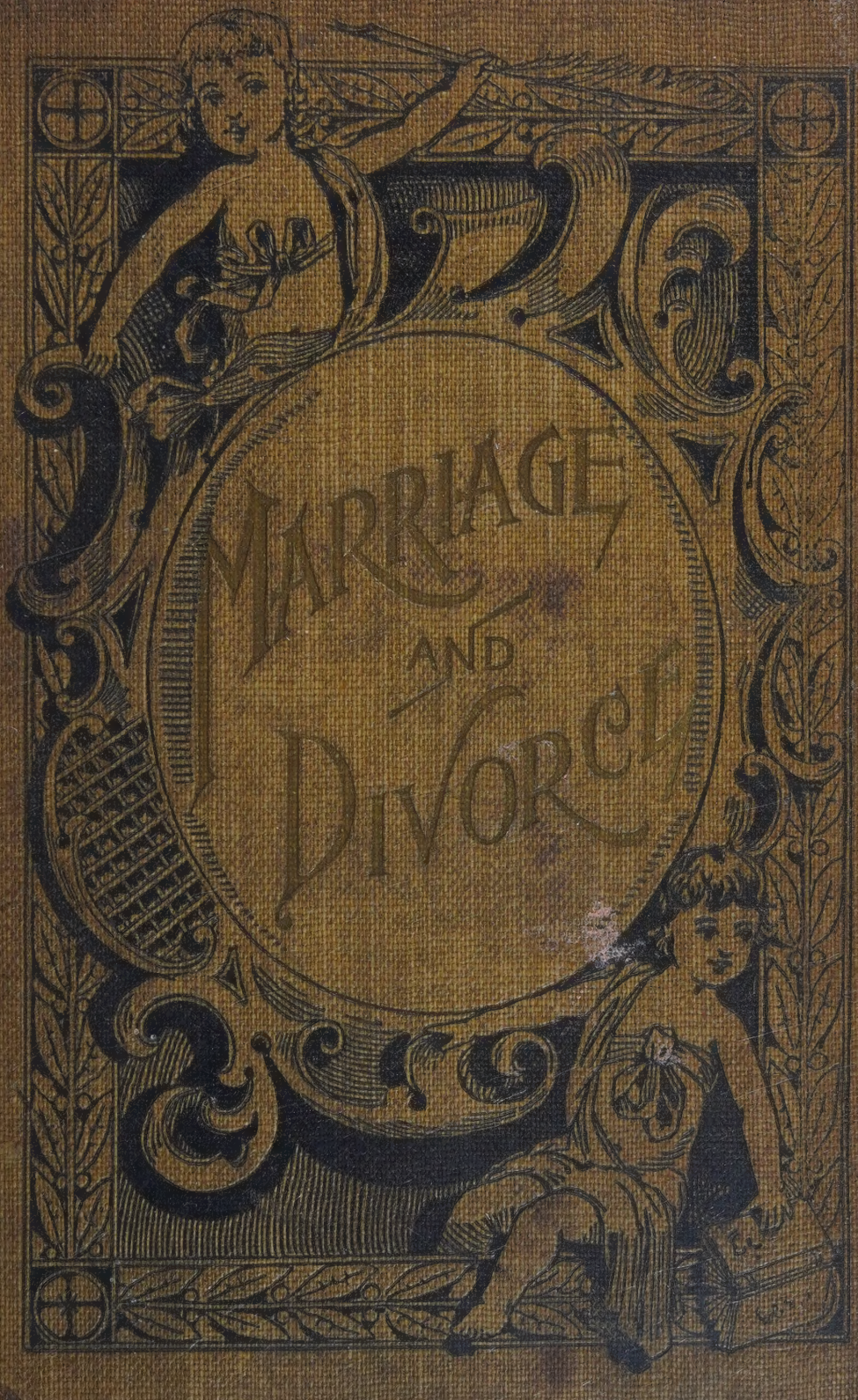
MARRIAGE
AND
DIVORCE

Whitefield Bowers

ΔΠΘ
200

"A PERFECT MARRIAGE IS AS RARE AS PERFECT LOVE."

DINAH MULOCK

Marriage and Divorce

THE EFFECT OF EACH ON PERSONAL STATUS AND PROPERTY RIGHTS, WITH A CONSIDERATION

—OF—

FRAUDULENT DIVORCES AND THE ETHICS OF DIVORCE

FOR POPULAR AND PROFESSIONAL USE

BY HENRY C. WHITNEY

COUNSELOR OF THE SUPREME COURT OF THE UNITED STATES . . .

MDCCCXCIV

John E. Potter & Company

Philadelphia

New York, Boston, Chicago

Copyright, 1894
By Henry C. Whitney

TABLE OF CHAPTERS.

I. Preliminary, ... 7
II. Marriage, ... 16
License and Consent, ... 60
Marriage after Divorce, ... 64
Validity of Marriages Contracted Beyond State, . 65
Form of Ceremony, ... 66
III. Divorce, ... 71
Egypt's Divorce Laws, ... 76
Statutory Provisions Concerning Divorce, . . 86
Classification of Causes for Divorce, . . . 104
The Doctrine of Absence, ... 108
Adultery, ... 114
Cruelty, ... 118
Impotence, ... 125
Desertion, ... 129
Fraud, Force, Error, Mistake, Duress, . . 132
Pregnancy before Marriage, ... 134
Gross Neglect of Duty, ... 135
Insanity, ... 137
Mental Weakness or Idiocy, ... 137
Sodomy, ... 138
Intolerable Treatment or Offering Indignities, . 139
Failure to Support, ... 140
Miscegenation, ... 140
Joining Religious Sect which Denies Marriage, . 142
Conviction of, or Imprisonment for, Crime, . . 142
Incompatibility of Temper, etc., ... 142
Miscellaneous, ... 143
IV. Defenses, ... 144
Collusion, ... 146
Condonation, ... 148
Connivance, ... 150
Recrimination, ... 152
Limitation, Laches, Delay and Insincerity, . . 154
Statutory Limitation 155
V. Foreign Marriage and Foreign Divorce, . . . 157

VI. Divorce Law in Europe and Canada, . . 195
VII. " " France, ... 196
VIII. " " Belgium, ... 197
IX. " " Austria, ... 197
X. " " Hungary, ... 198
XI. " " Switzerland, ... 199
XII. " " Sweden, ... 200
XIII. " " Denmark, ... 201
XIV. " " German Empire, ... 201
Baden, ... 201
Elsass Lothringen, ... 202
XV. Divorce Law in Saxony, ... 202
XVI. " " Wurtemburg, ... 202
XVII. " " Prussia, ... 203
XVIII. " " Hamburg, ... 204
XIX. " " Netherlands, ... 204
XX. " " Roumania. 204
XXI. " " Russia, ... 204
XXII. " " Poland, ... 204
XXIII. " " Finland, ... 205
XXIV. " " Italy, ... 205
XXV. " " Nova Scotia, ... 205
XXVI. " " New Brunswick, ... 205
XXVII. " " Prince Edward's Island, . . 205
XXVIII. " " British Columbia, ... 206
XXIX. The "Utah" Divorce Law, ... 207
XXX. Jurisdiction, ... 209
XXXI. The Parties, ... 233
XXXII. Of the Residence Required, ... 237
XXXIII. The Law of Place, ... 243
XXXIV. An Exposition of Fraudulent Divorces, . . 253
XXXV. Practice and Precedents, ... 272
XXXVI. Of the Courts, ... 299
XXXVII. Alimony, ... 302
XXXVIII. Children, ... 309
XXXIX. Property Rights, ... 316
XL. Dower, ... 322
XLI. "Void," "Voidable," and Nullity, . . . 327
XLII. Legislative Divorces, ... 342
XLIII. Separation Under a Contract, ... 344
XLIV. Breach of Promise of Marriage, ... 347
XLV. The Ethics of Divorce, ... 349

PREFACE.

In an active law practice extending over a period of thirty-five years, I have brought in courts, and disposed of, very many cases of *divorce*, and have advised concerning a still greater number of cases, in which *divorces* were desired, but in which suits were not brought. And these experiences have convinced me that this branch of law is quite as honorable inherently, and equally as necessary and proper as any other branch which deals with *personal* rights and wrongs; and that while it is a disagreeable and unprofitable line of practice, yet that honorable and high-minded practitioners owe it to their profession to not disdain, disparage and avoid it, as is generally done, but to include it in their usual work, and, by thus giving it a respectable standing in the profession, to suppress the charlatans and quacks who monopolize and degrade it, and make it a *pariah* in a responsible and dignified law practice. I am satisfied that the legal profession, by placing this department on the same social plane that they do the writ of *habeas corpus*, the administration of estates, or the management of ordinary litigation, and, by giving courageous and unwelcome advice to those who tend to error in this bye and forbidden path, would do very much to eviscerate the *abuse* of wholesome laws, which have made this subject so odious and reprehensible. If reputable practitioners alone could manage and control this business the *shysters* would soon find their avocations gone, and fraudulent divorces, now so frequent, would be reduced to a minimum, for the abuse of the *divorce* system or institution is not in the laws as they exist, but in the abuse of the law in practice. In the method suggested there would be a reform in a double sense—*first*, in the law office;

second, in the administration in courts; for if reputable lawyers would advise against fraudulent divorces, the number of such divorces attempted would be greatly diminished, and courts would be more sedulous to check them, also, when they appeared in court.

An uninformed person would be astonished to learn of the villainy practiced in divorce law, as administered for the past forty years. It seems somehow to be the *bete noir* of the legal profession, and the reasons for it are, as I suppose, that it is not profitable, and that the clients, especially the female element, are unbusiness-like and difficult to advise with, and, when responsible advice is given not to their liking, they seek more palatable advice elsewhere. They think, as a rule, that the law *should* afford a panacea for their ills, and it is difficult and disagreeable to instruct them otherwise. A campaign of education should be made by our profession, in this matter, and the bar should be fearless in venturing responsible advice, and equally brave in charging for it, for nothing degrades an element of law practice so much as ignorance of, or indifference to it, the refusal or inability to properly advise or act, and the equal carelessness or negligence to properly charge for advice. The liberty, custody of children, property rights and peace of mind of large numbers of our people are involved in this disagreeable subject with an ill name. It would be heroism in our profession to elevate the standard of law practice and popular opinion in reference thereto, for *divorce* is here to stay, and the legal profession can determine whether it shall be managed by the sober arts of respectable administration, or by the maladroit devices of malpractice.

Chicago, May 1st, 1893.

I.

PRELIMINARY.

All good reasons and every element of propriety concur that the subject of Divorce should be discussed by the legal profession in a dignified and candid manner, and entertained by the public at large in a generous and liberal spirit.

For *divorce* is an institution of the nineteenth century, as well defined and as firmly intrenched in society as that of marriage; and while it has always been known and practiced since the era of organized society, it has attained its highest development in this age of the greatest enlightenment, and in this land of the utmost freedom of conscience and action.

Our legislatures, acting in harmony with the spirit of the age, make, amend and change laws on this interesting social subject; and our courts, even of the highest resort, expound, interpret and enforce those laws. If, as sometimes occurs, some fossilized judge, with antique ideas, attempts to abridge or limit its legitimate exercise, he soon discovers his efforts to be in vain—the current flows on unchecked, and hardly a ripple bears witness of his efforts at repression or reform. The names of people from every rank and grade of society appear on our divorce dockets; and if divorce be an unnecessary evil (which we do not believe), it is one for which general society is responsible, and indicates either the progress and humanity, or the demoralization, of the age.

While there is a general concensus of opinion in the enlightened world in favor of the institution of divorce, the progress of the age has not made the least impression on two of the longest established and most powerful institutions of this age and nation, viz.: the Roman Catholic church and the

State of South Carolina, neither of which recognizes the institution at all; but, however much we may respect the sincerity and devotion of the former, it should furnish no guide for us in a matter which the genius of our laws has determined to be purely a civil contract, while the political heresies of the latter ought to bar it out as a safe guide in any matter of civil polity. We are even justified in selecting this State as affording a gauge of the sexual morality or immorality likely to obtain in a community where divorce is eschewed; and, accordingly, there exists among its statutes the following law, which has stood unchallenged for a century, to-wit:

SOUTH CAROLINA STATUTE.

"If any person * * * shall have already begotten, "or shall hereafter beget, any bastard child or children, or "shall live in adultery with a woman, the said person having "a wife or lawful children of his own living, and give or set- "tle, etc., for the use and benefit of said woman with whom "he lives in adultery, or of his bastard child or children, any "larger or greater portion of the clear value of his estate, "etc., than one-fourth part thereof, such deed, etc., is "hereby declared to be null and void for so much * * * "as shall or may exceed such one-fourth," etc.

and in the enforcement of which its Supreme court, composed of judges of great legal learning, scrupulous honor and austere morals, thus have moralized:

COMMENTS ON THEIR STATUTE.

"It is not the intention or the effect of the law to encour- "age vice and immorality, or to legalize corruption. It "recognizes a right in every man to make reparation to "injured innocence, or injured reputation. * * * It "does not confer on married men the exclusive privilege of "keeping mistresses; on the contrary, when one becomes so "forgetful of the duty which he owes to himself, to society "and his family, it prohibits him from giving the whole of

"his property to such a woman *in exclusion of his wife and "children,"* * * * "and leaves him, nevertheless, to "judge whether the object of his criminal intercourse ought "not also to be the object of his bounty, and to determine, "within certain restrictions, of the nature and extent of the "compensation which she deserves. And although it will "sometimes happen that a portion of a man's property will "be taken from a virtuous wife and an amiable family of "children, to support a dissolute and profligate mistress, yet "the rules of law must be uniform. In this country, where "divorces are not allowed for any cause whatever, we some-"times see men of excellent characters, unfortunate in their "marriages, and virtuous women abandoned, or driven away "houseless by their husbands, who would be doomed to "celibacy and solitude if they did not form connections "which the law does not allow, and who make excellent hus-"bands and virtuous wives still. Yet they are considered as "living in adultery because a rigorous and unyielding law, "from motives of policy alone, has ordained it so. * * * "It is not because a woman has forsaken the paths of virtue "that she is to be abandoned and forsaken. The first "woman that was made, who came pure and spotless from "her Maker's hand, was the victim of seduction, but she was "still provided for. And the law looks with that indulgence "on the frailties of human nature as not to consider every "error an unpardonable crime."

Cusack vs. White, 2 Mills (S. C.) 368.

While in another case, in the same court, the institution of marriage is thus likened to a horse trade:

"All marriages, almost, are entered into on one of two "considerations, that is, love or interest: and the court is "induced to believe the latter is the foundation of most of "them. If the complainant in this case chose to marry a "very aged man, and if she has made a sacrifice of herself "on the altar of interest, it is not for this court to say she "had not a right to do so. If, on the other hand, the de-

"fendant chose to dispose of a part of his property for which "he had little or no use, * * * to a person to take care "of him in his days of imbecility, and one who would soothe "his cares at the close of life, he also has a right to do so."

For our part, we prefer the legal institution of *divorce* to the legal institution of *concubinage*.

Moralists who are wont to contrast to our disparagement the by-gone days, when *divorce* was comparatively unknown, with the present time, when it is so common, seem to be oblivious of, or to ignore other facts—that in the days of primeval simplicity the modes and habits of life were entirely different from those in vogue now. Persons then were reared and educated in the localities of their nativity, and, when they attained to their majority, if they settled elsewhere than in the home of their youth, they made this settlement once for an entire lifetime, and, before doing so, selected their marital companions from the playmates of their childhood. They thus usually knew from their earliest years those who were to be the partners of their lives, and the margin for deception and mistake was, in consequence, comparatively small, while the stability of their homes and domicils also tended to pervade and to become the characteristic and habit of their entire domestic affairs.

Moreover, in those days of steady habits, newly married persons at once founded isolated and independent homes of their own. Hotels and boarding-houses were unknown and unthought of as *homes*. "Love in a cottage" was not then a lost art, and every married man was understood to be a freeholder, and every married woman to be a literal housekeeper.

In those sober days traveling was a casual or fortuitous circumstance in one's life, and the avocations which rob men of their sleep were rare. Married people spent their lives together, affection grew into constancy, and deep and abiding love effectually barred the ingress of the destroyers of domestic concord.

In such condition of affairs it is manifest that *divorce*

would be infrequent and abhorred, and it is only necessary to assign habit, and not virtue, as the sufficient cause of the limited empire *then* assigned to this *now* all-conquering hero.

Again: In those days the individuality of the wife was merged and lost in the husband; her property and debts became his; she could not transact business herself; she was, alike by the marital and conventional law, consigned to the privacy and seclusion of her home. But the married woman's laws have changed all this, and the married woman occupies a superior place now in regard to the laws concerning property. She may own her own separate property, with no let or hindrance on the part of her husband; she may transact business entirely independent of him in many of the States, and she is accorded the right, generally, to practice in all the professions, and work at any of the trades. Moreover, a custom is quite prevalent, and which tends greatly to the aggrandizement of a wife's position, of reckless men transacting business in their wives' names and putting their property in their names in order to cheat and defraud their creditors.

That these radical social and economic changes should produce a radical change also in our habits of divorce is a necessary and obvious sequence; to expect the habit and paucity of divorces to remain the same under one system as under the other is to take no note of the co-relation between cause and effect, and is to ignore the aphorism that "circumstances alter cases."

Again: While the tendencies of real *home* life were to preserve and strengthen affection and affinity of married couples, the tendency of hotel and boarding-house living has a natural tendency to disintegration and discontent. Where young people of either sex are brought in familiar contact with a miscellaneous throng of persons of the opposite sex, in the various conditions and situations of domestic life, their predilections, affections and affinities are apt to be unsettled; and, where this entering wedge of discord is once allowed to enter the domestic circle, a complete sundering of the family

affections is almost an inevitable consequence. Closely allied to this most potent cause for evil is the radical change in the business habits of our people. It was once rare for a man to be absent from his family circle beyond a few hours at a time; now, however, there are scores of avocations which compel men to be absent from their families for greater or lesser periods of time, and frequently for long periods; to expect such a condition of affairs to be compatible with the infrequency of causes for divorce of ancient days is absolutely unreasonable.

Thus, while moralists berate what they term the increasing *evil* of the institution of *divorce*, they take no account of the radically changed condition of our social life, making necessary and inevitable an entirely different condition of our divorce system.

One of the conditions of marriage and the marital condition is that of an abridgment of unrestrained personal liberty, and the imposition of restraint upon its members; where this union is sanctified by love, this limitation of personal liberty is not irksome, but in a union where the essential element of cohesion—love—is eliminated, this restraint becomes irksome, and each day but adds to the burden and misery of the marriage state.

As the conditions of society in the olden time were favorable to the growth and development of love, the conditions of social life now and in the recent days are inimical to its existence, and the necessary consequence of a diminution of that essential ingredient to a blissful married state engenders and inspires the antipodal elements of indifference, disgust and hatred, and thus renders impossible the continuance of the married relation except upon terms which are obnoxious and demoralizing to both parties.

It is claimed by opponents of the present laxity of the divorce system that the best remedy for the unhappy condition of mis-matched and inharmonious couples is to keep them tightly bound in the galling chains of wedlock until

love, affection and mutual loyalty are restored to the jarring union.

That this blessed consummation is quite possible of attainment with mutual advantage to both parties may be conceded, but in such a large preponderance of cases as to establish it as the general rule no such grateful results are to be expected, except as the result of the breaking down and crushing out of the individuality, independence and womanhood of the weaker party, all persons who have sufficiently studied the problem of social life well know.

We do not desire to controvert the question but that the outward show and technical integrity of marital felicity is not too dearly bought at the price of the annulment of the will, individuality and autonomy of the female involved in the problem, but it cannot, certainly, be otherwise than out of place and inharmonious with the popular and growing sentiment of women's rights, which find an honored place in our statute books, in our social customs, in our literature, and in our religion.

That a certain amount of force is necessary to be used in preserving the conjugal relation is undoubted, and the difficult question is presented of how much force is proper to be used.

In the olden days, in England, the institution of divorce was unknown, or, rather, it was only ideally possible through the media of an act of parliament, but it must not be lost sight of that in that same nation which thus fostered marital slavery was entwined in its pillars of state and engrafted upon its common law the permission of any lord of creation to correct and punish his wife "with a stick not larger than his thumb."

In those days, in England, deeds of separation constituted a contract, well known to English law and lawyers, and it was not a matter unknown or uncommon for two separate and distinct families to grace the genealogic chart of the same loyal Briton, one deriving its maternity from a now neglected

wife, and the other being the clandestine product of an irregular alliance with a housekeeper—so called—or some other similar substitute for a cleanly and loyal home.

The Roman church still pursues the ancient policy of Great Britain, of consigning the participants at a marriage ceremony to a sealed-up matrimonial dungeon—however replete with horrors it might prove.

The product of this policy is often enough seen in sad, abused, maltreated wives following brutal husbands to the ends of the earth, bound to them by religious vows and superstition's adamantine chains. The instance will not be forgotten of one of these slaves of the matrimonial tyranny arising in the police court, where her husband was fined for cruelly beating her, and exclaiming: "Well! thank God, I can pawn my feather bed, and pay John's fine."

Society has no right to complain of the granting of divorces provided the sound discretion of our courts of general jurisdiction pronounce such divorces necessary and proper.

If society wants to inaugurate a reform it must begin lower down than the divorce courts; it is inexpressively sad to witness the great and growing prevalence of divorce, but it would be very much more melancholy if the causes therefor were suffered to continue and the remedy to be withheld; it is sad to behold the enlargement of our penitentiaries, but what would society be without them?

And in all of our comments we have not spoken yet of fraudulently obtained or unwarranted divorces; only such as would commend them to sound and conservative judgment as being in all respects necessary and just, said judgment to not be biased in any way or degree by reasons of prejudice, conventionalism or superstitious reverence for authority human, or, supposed, divine.

We discard all fraudulent divorces, and, could we have our way, we would interdict all fraud in divorce law or its application as rigorously as in any department of jurisprudence. To recapitulate:

(1.) The great increase of applications for divorce has an adequate cause in the changed social and economic conditions of life.

(2.) However great may be the evil of so many divorces, a much greater social evil would supply its place if the causes for divorce were suffered to continue, and the remedy of divorce were withheld.

(3.) A limited area of divorce is not compatible with the enfranchisement and enlarged freedom of the female sex.

(4.) Wise and judicious statesmanship, and not abstract morality, is the thing needed to prescribe our divorce laws, and adapt them and their administration to the current exigencies of social life.

(5.) While marriage may be, sentimentally, a religious sacrament, it is practically a legal contract, and its annulment must be a subject of logical deduction and judicial consideration.

(6.) Society can be trusted to take proper care of its divorce laws; the divorce laws of the various States are moulded by inevitable necessity, and whenever they grow too lax, as in Indiana a few years since, public opinion compels the legislature and the courts to apply the corrective.

(7.) The field for the labors of the reformer is the social world; let the causes for divorce be abridged, and divorce as an effect will be abridged also.

II.

MARRIAGE.

"There is no graver event in a man's life than marriage. It may prove an inestimable blessing, the subtle influences of which will permeate every hour of the day, strengthen every fibre of his moral being, and by its satisfying repose to the affections, give to his intellect a calmer and more continuous sweep. It may also prove a desolating evil, numbing the sympathies, irritating and scattering the intellectual energies, distorting the life."—*G. H. Lewes.*

"Marriage is nothing but a civil contract. 'Tis true, 'tis an ordinance of God. So is every other contract. God commands me to keep it when I have made it."

"If all actions of man's life, his marriage does least concern other people. Yet of all actions of our life, 'tis most meddled with by other people."—*Selden.*

"Is not marriage an open question, when it is alleged from the beginning of the world that such as are in the institution wish to get out, and such as are out wish to get in?"—*Montaigne.*

> Oh! Curse of marriage,
> That we can call these delicate creatures, ours,
> And not their appetites. —*Shaks.*

> Let me not to the marriage of true minds
> Admit impediments. —*Shaks.*

Marriage is treated by all civilized nations as a peculiar and favored contract. It is, in its origin, a contract of natural law. But it appears to me to be something more than a mere contract. It is rather to be deemed an *institution* of society, founded upon the consent and contract of the parties, and, in this view, it has some peculiarities in its nature, character, operation, and extent of obligations, different from

what belong to ordinary contracts. It may exist between two individuals of different sexes, although no third person existed in the world. * * * In civil society, it means a civil contract, regulated and prescribed by law, and endowed with civil consequences.[1] In many civilized countries, acting under a sense of the force of sacred obligations, it has had the sanctions of religion superadded. It then becomes a religious, as well as a natural and civil contract, for it is a great mistake to suppose that because it is the one, therefore it may not likewise be the other. The common law of England, and which also obtains in America, considers marriage in no other light than a civil contract. In Catholic countries, and also in some of the Protestant countries of Europe, it is treated as a sacrament.[2]

"Marriage being entirely a personal, consensual contract, it may be thought that the *lex loci* must be resorted to in expounding every question that arises relative to it. But it will be observed that marriage is a contract *sui generis*, and differing in some respects from all other contracts, so that the rules of law which are applicable in expounding and enforcing other contracts may not apply to this. The contract of marriage is the most important of all human transactions. It is the very basis of the whole fabric of civilized society. The status of marriage is *juris gentium*, and the foundation of it, like all other contracts, rests on the consent of the parties. But it differs from other contracts in this, that the rights, obligations or duties arising from it are not left entirely to be regulated by the agreements of parties, but are, to a certain extent, matters of municipal regulation over which the parties have no control by any declaration of their will. It confers the status of legitimacy on children born in wedlock, with all the consequential rights, duties and privileges thence arising; it gives rise to the relations of consanguinity and affinity; in short, it pervades the whole system of civil society. Unlike other contracts, it cannot,

[1] Story, Conf. of Laws, 108. [2] Hag., Con. 63.

in general amongst civilized nations, be dissolved by mutual consent, and it subsists in full force, even although one of the parties should be forever rendered incapable, as in case of incurable insanity or the like, from performing his part of the mutual contract. No wonder that the rights, duties and obligations arising from so important a contract should not be left to the discretion or caprices of the contracting parties, but should be regulated in many important particulars by the laws of every civilized country. And such laws must be considered as forming a most essential part of the public laws of the country. As to the constitution of the marriage, as it is merely a personal, consensual contract, it must be valid everywhere if celebrated according to the *lex loci*, but with regard to the rights and duties thence arising the law of the domicil must be looked to. It must be admitted that in every country the laws relative to divorce are considered as of the utmost importance, as public laws affecting the dearest interest of society.

"It is said that in every contract the parties bind themselves, not only to what is expressly stipulated, but also to what is implied in the nature of the contract, and that these stipulations, whether express or implied, are not affected by any subsequent change of domicil. This may be true in the general case, but, as has been already noticed, marriage is a contract *sui generis*, and the rights, duties and obligations which arise out of it are matters of so much importance to the well-being of the State that they are regulated, not by the private contract, but by the public laws of the State, which are imperative on all who are domiciled within its territory. If a man in this country were to confine his wife in an iron cage, or to beat her with a rod of the thickness of the judge's finger, would it be a justification to any court to allege that these were powers which the law of England conferred on a husband, and that he was entitled to the exercise of them because his marriage had been celebrated in that country?

"In short, although a marriage which is contracted accord-

ing to the *lex loci* will be valid all the world over, and although many of the obligations incident to it are left to be regulated solely by the agreement of the parties, yet many of the rights, duties and obligations arising from it are so important to the best interests of morality and good government that the parties have no control over them, but they are regulated and enforced by the public law, which is imperative on all who are domiciled within its jurisdiction and which cannot be controlled or affected by the circumstance that the marriage was celebrated in a country where the law is different. In expounding or enforcing a contract entered into in a foreign country and executed according to the laws of that country, regard will be paid to the *lex loci*, as the contract is evidence that the parties had in view the law of the country and meant to be bound by it. But a party who is domiciled here cannot be permitted to import into this country a law peculiar to his own case and which is in opposition to those great and important public laws which our legislature has held to be essentially connected with the best interests of society."—*Lord Robertson.*[1] Lord Stowell said: "The validity of the marriage rites must be tried by reference to the law of the country where * * * they had their origin." Between persons *sui juris*, marriage is to be decided by the law of the place where it is celebrated. If valid there, it is valid everywhere. It has a legal ubiquity of obligation. If invalid there, it is equally invalid everywhere. In a case in Maine the court says: "When the contracting parties have entered into the married state, they have not so much entered into a *contract* as into a new *relation*, the rights, duties, and obligations of which rest, not upon their agreement, but upon the general law of the State, statutory or common, which defines and prescribes those rights, duties, and obligations. They are of law and not of contract. It was of contract that the relation should be established, but, being established, the power of the parties as to its extent or

[1] Story, Conf. of Laws, 113.

duration is at an end. Their rights under it are determined by the will of the sovereign, as evidenced by law. They can neither be modified nor changed by any agreement of the parties. It is a relation for life, and the parties cannot terminate it at any shorter period, by virtue of any contract they may make. The reciprocal rights arising from this relation, so long as it continues, are such as the law determines from time to time, and no other." Again, court says: "It is not a contract within the meaning of the constitution which prohibits the impairing of the obligation of contracts. It is rather a social relation, like that of parent and child, the obligations of which arise, not from the consent of concurring minds, but are the creation of the law itself; a relation the most important, as affecting the happiness of individuals—the first step from barbarism to civilization, the purest tie of social life, and the true basis of human progress."[1]

The Supreme Court of Rhode Island says similarly: "*Marriage*, in the sense in which it is dealt with by a decree of divorce, is not a contract, but one of the domestic relations. In strictness, though formed by contract, it signifies the *relation* of husband and wife, deriving both its rights and duties from a source higher than any contract of which the parties are capable, and, as to these, uncontrollable by any contract which they can make. When formed, this relation is no more a contract than fatherhood or sonship is a contract."[2] It has also been defined as a *public institution*, and more than a contract. And it has frequently been adjudged to not be such a contract as is referred to in the Constitution of the United States, which provides that no State shall pass any law impairing the obligations of a contract. It has been said that "there are three parties to every divorce proceeding: the husband, the wife, and the State: the first two parties representing their respective interests as individuals, the State concerned to guard the morals of its citizens, by taking

[1] 51 Me., 483. [2] 4 R. I., 187. [3] 9 Ind., 37.

care that neither by collusion or otherwise shall divorce be allowed under such circumstances as to reduce marriage to a mere temporary arrangement of conscience or passion."[1] And although, in this case, the parties both appeared in the Indiana court and consented to the jurisdiction and the decree, the court in Michigan said: * * * "The divorce must be void; and the State has very properly treated it as void, by instituting this prosecution" (for bigamy), and the defendant was convicted and imprisoned. Again, it has been said by a distinguished foreign jurist: "Though the origin of marriage is contract, it is in a different situation from all others. It is a contract coeval with, and essential to, the existence of society, while the relations of husband and wife, parent and child, to which it gives rise, are the foundation of many rights, acknowledged all the world over, and which, though differently modified in different countries, have everywhere a legal character, determined by their particular laws and usages, altogether independent of the terms of the contract or the will of the parties at the time of entering into it."[2]

And it will be found that, in our country, although the marriage is founded in contract, yet after it is celebrated it then becomes a *status*, like that of parent and child, and that, while having many attributes of a contract, it is more than a contract.

A legal marriage among the Romans was made in three different ways, called *usus*, *confarreatio* and *coemptio*. *Usus*, usage or prescription, was when a woman, with the consent of her parents or guardian, lived with a man for a whole year without being absent three nights, and thus became his lawful wife or property by prescription. If absent for three nights she was said to have interrupted the prescription and thus prevented the marriage.

Confarreatio was when a man and woman were joined in marriage by the *pontifex maximus* or *flamen dialis* in

[1] 25 Mich., 257. [2] Eng. Ecc. 495.

presence of at least two witnesses, by a set form of words, and by tasting a cake made of salt, water, and flour, called *far* or *panis farrens*, or *farreum libium*, which was offered with a sheep in sacrifice to the gods.

This was the most solemn form of marriage, and could only be dissolved by another kind of sacrifice, called *diffarreatio*. By it a woman was said to come into the possession or power of her husband by the sacred laws. She thus became partner of all his substance and sacred rights, those of the *Penates* as well as of the *Lares*. If he died intestate and without children she inherited his whole fortune as a daughter. If he left children, she had an equal share with them. If she committed any fault, the husband judged of it in company with her relatives, and punished her at pleasure. The punishment of women publicly condemned was sometimes, also, left to their relatives. The children of this kind of marriage were called *patrimi* or *matrimi*, often employed for particular purposes in sacred solemnities. Certain priests were chosen only from among them, as the *flamen* of Jupiter, and also the vestal virgins. According to Festus, those were so called whose parents were both alive: thus, if only the father was alive, *patrimi;* if only the mother, *matrimi*. Hence, Minerva is called *patrimi virgo*, because she had no mother, and a man who had children, while his own father was alive, *pater patrimus*. The ceremony of marriage, in later times, fell much into disuse. Hence, Cicero mentions only two kinds of marriage, *usus* and *coemptio*. The latter was a kind of natural purchase, when a man and woman were married by delivering to one another a small piece of money and repeating certain words. The man asked the woman if she was willing to be the mistress of his family. She answered, she was. In the same manner the woman asked the man, and he made a similar answer.

The effects of this rite were the same as of the former. The woman was to the husband in place of a daughter, and

he to her as a father. She assumed his name, together with her own, as Antonia Drusi, Domitia Bibuli, etc. She resigned to him all her goods, and acknowledged him as her lord and master. The goods which a woman brought to her husband, besides her portion, were called *parapherna orum* or *bona paraphernalia.* In the first days of the republic dowries were very small; that given by the Senate to the daughter of Scipio was only 11,000 asses of brass, or $177.00, and one Meguillia was surnamed Dolata, or the great fortune, because she had 500,000 asses, *i.e.*, $807.00. But afterwards, on the increase of wealth, the marriage portions of women became greater, $40,360 being the usual portion of a lady of Senatorian rank; some had $807,290. Sometimes the wife received to herself a part of the dowry, hence called *dos recepticia*, and a slave who was not subject to the power of her husband. Some think that *coempti* was used as an accessory rite to *confarreatio*, and retained when the primary rite was dropped. The right of purchase in marriage was not peculiar to the Romans, but prevailed also among other nations, as the Hebrews—so in the days of Homer, to which Virgil alludes. Some say that a yoke used, anciently, to be put on a man and woman about to be married, whence they were called *conjuges.* But others think this expression merely metaphorical, as Horace and Plautus. A matrimonial union between slaves was called *contubernium*, the slaves themselves *contubernales*, or, when a free man lived with a woman not married (*concubinatas*), in which case the woman was called *Concubinia*, *Pellaca*, or *Pellex*: thus *Pellex Reginae*, *Filae* or *Sorosis.*

Married women were called *matronae* or *matres familiae*, opposed to *meretrices*, *prostitutae*, *scorta*, *etc.*

There could be no just or legal marriage, for better or for worse, unless between Roman citizens, unless a particular permission for that purpose was obtained first from the people or senate and afterward from the emperors. Anciently a Roman citizen was not allowed to marry a freedwoman, since An-

tony is reproached by Cicero for having married Fulvia, the daughter of a freedman, as he afterward was detested at Rome for marrying Cleopatra, a foreigner, before he divorced Octavia, but this was not esteemed a legal marriage. By the *lex papia poppaea* a greater freedom was allowed. Only senators and their sons and grandsons were forbidden to marry a freedwoman, an actress, or the daughter of an actor. But it was not until Caracalla had granted the right of citizenship to the inhabitants of the whole empire that Romans were permitted freely to intermarry with foreigners.

The Romans sometimes prohibited intermarriage between neighboring districts of the same country, and, what is still more surprising, the states of Italy were not allowed to speak the Latin language in public, nor their crier to use it in public without permission. The children of a Roman citizen, whether man or woman, and a foreigner, were accounted spurious, and their condition little better than slaves. They were called *hybridæ*, the general name of animals of a mixed breed or produced by animals of a different species—mongrels, as a mule—hence applied to those who spring from parents of different nations, and to words compounded from different languages.

The children of a lawful marriage were called *legitimi*, all others *illegitimi*. Of the latter there were four kinds: *naturales*, from a concubine; *spurii*, from a *meretrice*, or *scorto*, and *nicrito patre*. There were certain degrees of consanguinity within which marriage was prohibited, as between a brother and sister, an uncle and niece, etc. Such connection was called *incestus*, or with a vestal virgin. These degrees were more or less extended or contracted at different times. Polygamy, or a plurality of wives, was forbidden among the Romans. The age of puberty, or marriage, was from fourteen for men and twelve for girls. A custom prevailed of espousing infants to avoid the penalty of the law against bachelors, but Augustus ordained that no nuptial engagement should be valid which was made more than two years before the cele-

bration of the marriage; that is, below ten. This, however, was not always observed.

No young man or woman was allowed to marry without the consent of their parents or guardians. There was a meeting of friends, usually at the house of the woman's father or nearest relation, to settle the articles of the marriage contract, which was written on tables and sealed. The contract was called *sponsalia*, espousals, the man who was betrothed or affianced *sponsus*, and the woman *sponsa*. The contract was made in form of a stipulation, *an spondes spondeo*. Then, likewise, the dowry was promised to be paid down on the marriage day or afterward, usually at three separate payments. On this occasion there was usually a feast, and the man gave the woman a ring by way of pledge, which she put on her left hand, on the finger next the heart, because it was believed a nerve reached from thence to the heart. Then, also, a day was fixed for the marriage. Certain days were reckoned unfortunate, as the Kalend, Nones and Ides, and the days which followed them, particularly the whole month of May, and those days which were called *Atri*, marked in the calendar with black, also certain festivals, as that of the *Solii*, *Parentalia*, etc. But widows might marry on those days. The most fortunate time was the middle of the month of June. If, after the espousals, either of the parties wished to retract, it was called *repudium*, and when a man or woman, after signing the contract, sent notice that they wished to break off the match, they were said to repudiate or renunciate. But *repudii* also signifies to divorce either a wife or a husband.

On the wedding day the bride was dressed in a long white robe, bordered with a purple fringe, or embroidered ribbons, bound with a girdle made of wool, which the husband untied. Her face was covered with a red or flame-colored veil to denote her modesty. Her hair was divided into six locks with the point of a spear and crowned with flowers. Her shoes were of the same color as her veil. No marriage was celebrated without consulting the auspices and offering sacrifices

to the gods, especially to Juno, the goddess of marriage. Anciently, a hog was sacrificed. The gall of the victim was always taken out and thrown away, to signify the removal of all bitterness from marriage.

The marriage ceremony was performed at the house of the bride's father or nearest relation. In the evening the bride was conducted to her husband's house. She was taken apparently by force from the arms of her mother or nearest relation, in memory of the violence used to the Sabine women. Three boys, whose parents were alive, attended her, two of them supporting her by the arm, and the third bearing a flambeau of pine or thorn before. There were five other torches carried before her, called *faces nuptiales.*

Maid-servants followed with a distaff, a spindle and noal, intimating that she was to labor at spinning, as the Roman matrons did of old, and as some of the most illustrious did in later times. Augustus is said to have seldom worn anything but the manufacture of his wife, sister, daughter, and nieces, at least for his domestic robes.

A boy named Camillus carried in a covered vase called *cumerum* the bride's utensils, and playthings for children.

A great number of relatives and friends attended the nuptial procession, which was called *officium.* The boys repeated jests and railleries as the bride passed along.

The door and door-posts of the bridegroom's house were adorned with leaves and flowers, and the rooms with tapestry. When the bride came thither, being asked who she was, she answered: "Even as my lord is the father of my family, so also am I the lady and mother of the family." A new married woman was called Caia, from the wife of Tarquinus Priscus, who is said to have been an excellent spinster and housewife. Her distaff and spindle were kept in the temple of Saugus or Hercules.

The bride bound the door-posts of her husband with woolen fillets, and anointed them with the fat of swine or wolves to avert fascination and enchantments, whence she was called Uxor.

She was lifted on the threshold, or gently stepped on it. It was thought ominous to touch it with her feet, because the threshold was sacred to Vesta, the goddess of virgins. Upon her entry the keys of the house were delivered to her, to denote her being entrusted with the management of the family. A sheepskin was spread before her, intimating that she was to work at the spinning of wool. Both she and her husband touched fire and water, because all things were supposed to be derived from these two elements; with the water they bathed their feet.

The husband on this occasion gave a feast to his relatives and friends; also to those of the bride and her attendants. Musicians attended, who sang the nuptial song (epithalaneum). They often repeated the hymn to Hymen, from Hymen, the god of marriage among the Greeks, and Walassus, among the Romans, or from one Falassius, who lived in great happiness with his wife, as if to wish the newly married couple the like felicity. These words used also to be resounded by the attendants of the bride on the way to her husband's house.

After supper the bride was conducted to her bed-chamber by matrons who had been married to only one husband, called pronubae, and laid in the nuptial couch, which was magnificently adorned and placed in the hall opposite to the door, and covered with flowers—sometimes in the garden. If it had ever been used for that purpose before, the place of it was changed. There were images of certain divinities around, *slubigus*, *pertunda*, etc.

Nuptial songs were sung by young women before the door till midnight, hence called *epithalamia*. The husband scattered nuts among the boys, intimating that he dropped boyish amusements, and thenceforth was to act as a man; hence *nuces relinquere*, to shun trifles and mind serious business; or from boys playing with nuts in the time of the Saturnalia, which at other times was forbidden. Young women, when they married, consecrated their playthings or dolls or babies to Venus. The guests were dismissed with small

presents. Next day, another entertainment was given by the husband, called *repotia*, when presents were sent to the bride by her friends and relatives, and she began to act as mistress of the family by performing sacred rites. A woman, after marriage, retained her former name, as Julia, Fulvia, Octavia, Paulla, Valeria, etc., joined to that of her husband, Catonis Marcia, Julia Pompeii, Terentia Ciceronis, Livia Augustine.

The first inhabitants of Greece lived together without marriage. Cecrops, king of Athens, is said to have been the first author of this honorable institution among that people. After the Grecian commonwealths were settled marriage was very much encouraged by their laws (as it was among the Romans, though without much effect) and celibacy discountenanced, and, in some cases, punished. The Athenians had an express law that commanders, orators, and persons entrusted with public affairs should be married men. Polygamy was not commonly tolerated in Greece. The time of marriage was different in different States. The Spartans were not permitted to marry till they arrived at their full strength, and the Athenian lawyers are said to have directed that men should not marry till they were 35 years of age. The season of year which they preferred for that purpose was the winter, and especially the month of January. Incestuous mixtures, though practiced among the barbarous natives, were reckoned scandalous among the Greeks, though among them, as originally among the Hebrews, it seems to have been lawful to marry a half-sister, as appears manifest in the case of Miltiades and Abraham. Most of the Grecian States required their citizens to match only with citizens. The usual ceremony in promising fidelity among the Greeks was kissing each other, or giving their right hand, which was a general form of ratifying all agreements. Before the marriage was solemnized, the gods

were to be consulted and their aid implored, by prayer and sacrifices, by the parents or nearest relatives.

In Germany they have a kind of marriage called *morganatio*, wherein a man of quality, contracting with a woman of inferior rank, gives her the left hand instead of the right, and stipulates in the contract that the wife shall continue in her former rank, and that the children shall be of the same, so that they become bastards as to matters of inheritance, though they are legitimate in effect. They cannot have the names or arms of the family. None but princes or great lords of Germany are allowed this kind of marriage, but the universities of Leipsic and Jena have declared against the validity of such contracts.

The Hebrews also purchased their wives by paying a competent dowry for them, and Aristotle makes the purchase of their wives among the ancient Grecians an argument to prove them an uncivilized people.

Widows were obliged to wear mourning for their husbands at least ten months, and if they married within that time they were held infamous; but men were under no such restriction. M. Antoninus, the philosopher, after the death of his wife Faustina, lived with a concubine, that he might not bring in a stepmother on his children.

Second marriages in women were not esteemed honorable, and those who had been married to but one husband, or remained in widowhood, were held in particular respect. Hence, *Univira* is often found in ancient inscriptions as an epithet of honor. Such as married a second time were not allowed to officiate at the annual sacred rites of female fortune.

Among the Germans second marriages were prohibited by law.

Marriage, by the Mosaic law, was subject to several restrictions. A man was forbidden to marry his brother's widow, unless he died without issue, in which case it was enjoined as a duty. So it was forbidden to marry a wife's sister, at least while the wife was living, which was not forbidden before the law, as appears from the instance of Jacob. The ancient Roman law is silent on this head, and Papinian is the first who mentions it on occasion of the marriage of Caracalla. The subsequent lawyers stretched the bonds of affinity so far that they placed adoption on the same footing with nature.

When a Laplander intends to marry, he or his friends court the father with presents of brandy; if he gain admittance to the fair one, he offers her some eatable, which she rejects before company, but readily accepts in private. Every visit to the lady is purchased from the father with a bottle of brandy, and this prolongs the courtship sometimes for two or three years. The priest of the parish at last celebrates the nuptials, but the bridegroom is obliged to serve his father-in-law for four years after marriage. He then carries home his wife and her fortune, which consists of a few sheep, a kettle, and some trifling articles. It is a part of the ceremony at a Lapland wedding to adorn the bride with a crown, ornamented with a variety of gaudy trinkets; and, on these occasions, the baubles are generally borrowed of their neighbors.

In Greenland a man does not marry till he is about twenty years of age, when he chooses a woman not much younger than himself, with whom he expects no dowry but her clothes, knife, lamp, and sometimes a stone boiler; to her skill in housewifery and sewing he pays a principal regard; and the women, on the other hand, esteem individuals of the opposite sex in proportion as they excel in hunting and fishing.

Polygamy, although by no means common among the Greenlanders, is not altogether unknown, and so far from its being considered a disgraceful thing for a man to have a pluralty of wives, he is respected for his industry, by which he is enabled to maintain them; but to be without children is deemed a matter of great reproach, and, therefore, in such

cases, the matrimonial contract is easily broken, for the man has only to leave the house in anger, and not return again for several days, and the wife, understanding his meaning, packs up her clothes, and removes to her own friends.

In Iceland brides at their wedding are adorned in a very particular manner; the bride wears close to her face, round her head-dress, a crown of silver gilt. She has two chains round her neck, one of which hangs down very low before, and the other rests on her shoulders. Besides these, she has a smaller chain on the neck, from which a heart generally hangs, that may be open to receive balsam or other kind of perfume.

Among the Tartars, the Bratski may marry as many wives as they can purchase. The price of a bride is paid in cattle of different kinds. A young woman, according to her beauty and character, will, among the rich, receive a hundred horses, twenty camels, fifty horned cattle, two hundred sheep, and thirty goats. The nuptials are celebrated on the same day that the cattle are delivered. For this purpose they erect a jurte of felt, entirely new, of a white color, and remarkably neat. The first three days are spent in feasting, singing and dancing. The newly married couple are then permitted to depart to their own habitation.

It is usual among some of the tribes for a young pair to live together as man and wife for one year; if during that time the woman has produced a child, their marriage is completed; but if not, they either separate at pleasure, or agree to make another year's trial. Traces of this custom may be discovered in the law of Scotland, according to which a marriage dissolved within a year and a day, and without a child, restores each party to the same situation as if no alliance had existed.

In Circassia, after marriage the women are kept very close, not even their husband's own relations being suffered to visit them; it is even a rule among this people that the husbands themselves shall never be seen by a third person in the presence of their wives, and this they observe strictly to their latest years. On the morning of the celebration of her nuptials, the bride presents to her betrothed a coat of mail, helmet, and all other articles necessary to a full equipment in war.

Among the Chinese, marriage is particularly protected,

as well by authority of the law as by the general spirit of order and decorum. The adulterer is always punished with death, and the same punishment is usually inflicted upon him who seduces an unmarried woman from the paths of rectitude.

A Chinese enters the married state often without ever having seen the woman he espouses; he knows nothing of her but what he learns from some female relation, who acts the part of a match-maker. But if he is imposed on, either with respect to her age or figure, he may obtain a divorce. The same matrons who negotiate the marriage determine also the sum which the intended husband must pay to the parents of the bride, for, in China a father gives no dowry to his daughter, but receives a certain sum from his son-in-law as a purchase.

The parents of the bride fix the day of marriage, always taking care to consult the calendar for the purpose of selecting one that is favorable to so important an event. At the appointed time the bride is placed in a chair or close palankin, and is surrounded by persons of both sexes, carrying torches and flambeaux, even in the middle of the day.

A troop of musicians with fifes, drums, and hautboys, march before the chair, and her family follow behind. The key of the chair in which she is shut up is committed to the care of a trusted servant, to be delivered to the husband only, who, richly dressed, waits at his gate for the arrival of the procession. When it approaches, the key is put into his hands, by means of which at the first glance he learns his fortune.

If he is discontented with his intended spouse he suddenly shuts the chair and sends her back to her relations, but to get rid of her it costs him a sum equal to that which he gave to obtain her.

If the husband is contented, she descends from her chair and enters the house; she is then committed into the hands of the women, who partake of an entertainment, and remain with her the whole day; the male part of the guests are treated in like manner by the husband. This part of the ceremony prevails in all Chinese grand entertainments: the women amuse themselves separately, and the men do the same in another apartment. The pomp increases according to the riches and rank of the parties.

Many superstitious observances respecting marriage, prevail in Arabia. The Arabs believe in the virtue of enchantment, and in the art of tying or untying the knots of fate. The miserable victim of this diabolical art addresses some physician or old woman, who is skilled in sorcery. Marriage is reckoned honorable in the East; a woman will marry a poor man or become a second wife of a man already married rather than remain in a state of celibacy; the men are equally disposed to marry, because their wives, instead of being expensive, are rather profitable to them.

A plurality of wives is allowed in Tonquin, and the husband may claim a divorce on the most trifling occasion, but he must restore the effects which the wife possessed at the time of marriage. The same indulgence is not allowed to the women. A woman convicted of adultery is thrown to an elephant, bred for the purpose, who, taking her up with his trunk, tosses her in the air, and when she falls tramples her under his feet and crushes her to pieces. A man may sell his wives and children, which, in time of scarcity, the poor make no scruple of doing.

They purchase their wives, and the marriage is performed by a priestess, who sacrifices some animal on the occasion, after which the bride is conducted home, and the ceremony concludes with an entertainment. They generally marry with their own tribe, and with near relations. Some of the tribes are restricted to one wife, while others admit of plurality of wives, and divorces for reasonable causes. Their funeral ceremonies are like those of the Chinese.

In the Pelew Islands the sort of attention paid by the men to their wives is very uncommon among the uncivilized parts of the globe. Their marriages consist in a solemn contract, without any ceremony, but they are strictly faithful to one another, and decency is uniformly supported. A pluralty of wives is allowed; men in general may have two, a rupack three, and the king five. They name their children without any ceremony, as soon as they are born.

Cecrops, king of Athens, first denominated marriage as a civil contract, and he made elaborate regulations concerning it.

The modern Greeks, adverting to the customs of the ancients, have retained the greatest part of the ceremonies which were formerly used in the celebration of nuptials. On

the eve of the marriage day the bride is led by her female acquaintance in triumph to the bath. Numerous attendants and music are always to be found upon these occasions. The bride, profusely adorned, covered with a red veil, proceeds with a solemn pace, supported by her female friends and relations. The splendid torch of Hymen still maintains its place among the modern Greeks. It blazes in their processions, and is an attendant in the chamber of the new-married couple, where it remains until the whole is consumed. If by any accident it should become extinguished the most unfortunate presages would be drawn, to prevent which unremitting vigilance is used.

The bridegroom and bride, before their presentation at the altar, are each adorned with a crown or chaplet, which, during the ceremony, are exchanged by the priest. A cup of wine, immediately after the benediction, is first given to the married couple; it is then delivered to the sponsors, and finally to the witnesses of the marriage.

The bride is supported by her friends, who accompany her home, and who prevent her from touching the threshold of the door, which would be reckoned ominous. She is then compelled to walk over a sieve, which is covered with a carpet, on the way to her husband's room. If the sieve should not crackle as she passes it would be considered as very prejudicial to the lady's honor, but all are happy, provided the ordeal prove propitious.

In the Ottoman Empire a man may have but one wife of the first class; she is legitimate, and her consent and that of her parents must first be obtained to the union, but he may have as many wives of the second class as he can maintain, who are termed wives *in kebin*, or tried for a term, and when the term is ended the contract is also ended, but may be renewed; and the third class authorized is that of slaves whom he may buy and use at pleasure, but he must perform the sexual act with his wife of the first class at least once a week, else, on complaint, he must diminish the number of his concubines.

Marriages are chiefly negotiated by the ladies: it is only a civil contract which either party may break. The terms being agreed on, the bridegroom pays down a certain sum of money, a license is taken out from the proper magistrate, and the marriage is solemnized. It is then celebrated with

mirth and jollity, and the money is usually expended in furnishing a house.

In Russia the lover goes to the bride's parents and in effect says: "I have money, where is your merchandise?" And if the consideration is sufficient, the contract is consummated without any reference to the consent of the bride.

Among the lower classes in Russia the nuptial ceremonies are peculiar to themselves. When the parents are agreed upon a match, though the parties themselves have never seen each other, the bride is examined by a number of females. On the wedding-day she is crowned with a garland of wormwood, and after the priest has tied the nuptial knot his clerk or sexton throws a handful of hops upon the head of the bride, wishing that she may prove as fruitful as that plant. She is then led home, with abundance of coarse ceremonies. The barbarous treatment of wives by their husbands, which formerly extended to the right of putting them to death, is now either guarded against by the laws of the country or by particular stipulations in the marriage contract.

In Asia and Africa, as well as among the aborigines, where marriage is recognized at all, the husband buys the wife of the parents, sometimes in the currency of the country and sometimes by presents. Among the Lapps and Finns the fee is so many reindeer. Among the American Indians when a man marries he must include all the sisters of the bride. I once visited the chief of the Osages, and he made an exhibit of all of his wives, including one little girl five years of age. Originally there was no ceremony *in facie ecclesiæ*, but the husband came with friends to the bride's home and claimed his bride. Sometimes he had to go through a mock struggle, but the *denouement* was in all cases the same: the husband carried the bride triumphantly to his house or lodge, sometimes she being unwilling and holding back or resisting with more or less pertinacity.

Pope Innocent III. made it a sacrament and declared a ceremony by a priest in orders essential to its validity, and all the Latin countries had to conform to it. It thus spread till it embraced all civilized people. Law writers and courts, however, have not so regarded it, but almost

universally have treated it as a mere civil contract, else as a *status*. Blackstone says: "Our law considers marriage in no other light than as a civil contract. * * * And taking it in this civil light the law treats it as it does all other civil contracts, allowing it to be good and valid in all cases when the parties at the time of making it were in the first place willing to contract—secondly, able to contract, and, lastly, actually did contract in the proper forms and solemnities required by law. Reeves in his Domestic Relations defines it as a mere civil transaction, to be solemnized in such manner as the legislature may direct. Rutherford, in his Institutes, mentions it as "a contract between a man and a woman, in which, by their mutual consent, each acquires a right in the person of the other for the purpose of their mutual happiness and for the production and education of children. "Judge Kent defines it as a contract *juri gentium*, and consent is all that is necessary. Bacon says that marriage is a compact between a man and a woman for the procreation and education of children. In Florida the court held that it was a mere contract.[1]

Marriage has always been held in law a valuable consideration on which to predicate a contract either between the husband and wife or third persons—it is founded on the consent of the contracting parties—it gives vested rights both to the persons and property of each of the contracting parties, and why then, when it possesses all these ingredients of the definition of the term contract, shall it be said not to be embraced within its provision and spirit?"[2]

If parties, competent to contract, in the presence of witnesses agree together to be husband and wife, and afterward cohabit and recognize each other as such, it is a sufficient marriage in New York.[3]

Marriage is treated merely as a civil contract not requiring legal forms, religious ceremonies, nor any special mode of proof, in New York.[4]

[1] 4 Fla., 23. [2] 4 Mo., 127. [3] 24 How. Pr. 455. [4] 4 Bradf. 454.

Strict proof (of marriage) is only required in prosecutions for bigamy, and in actions for criminal conversation. A marriage may be proved in other cases from cohabitation, reputation, acknowledgment of the parties, reception in the family, and other circumstances from which a marriage may be inferred. No formal solemnization of marriage was requisite. A contract of marriage made *per verba de presenti* amounts to an actual marriage and is as valid as if made *in facie ecclesiae*. The above is in New York.[1]

A common law marriage is not good in Maine, Maryland, Massachusetts, North Carolina, Tennessee, Connecticut, Delaware and Kentucky. There must be a ceremonial marriage. In Pennsylvania the marriage must be in writing and signed by the parties, and recorded in like manner as a deed must be. The New York courts have grown more and more lax, and her highest courts have declared that "a man and woman, without going before a minister or a magistrate, without the presence of any person as a witness, with no previous public notice given, with no form of ceremony, civil or religious, and with no record or written evidence of the act, and merely by words of the present, may contract matrimony."

In the territory of Arizona, by express statute, no ceremony is necessary.[2]

To constitute marriage *per verba de presenti* no particular words are necessary. If what is done and said evidences a present assumption by the parties of the marriage status, that is sufficient, whatever may be the form of the expression used.[3]

In an Illinois case the court said: "We are inclined to the opinion, supported as it is by the statements of many of the most eminent text writers, as well as by the decisions of courts of the highest respectability, that inasmuch as our statute does not prohibit or declare void a marriage not solemnized in accordance with its provisions, a marriage without observing the statutory regulations, if made according to

[1] 4 Johns, 53. [2] Rev. Stat., 1887. [3] 24 Ill app. 175.

the common law, will still be a valid marriage, and that by the common law of the contract, if made *per verba de presenti*, it is a sufficient evidence of a marriage."[1]

If a man and woman cohabit together in an illicit way; no length of time of such cohabitation will cause it to ripen into a marriage, and the presumption is that an illicit connection, once commenced, still remains illicit, but the parties may, themselves, change it into an innocent and lawful commerce, and when they do so, and evince such change by clear language or conduct, and continue the sexual commerce, it is thenceforth beyond their power to change back to a guilty connection. They are henceforth married, and can only change such condition by the medium of divorce, as in other cases.

(I adduce the following authorities in support of a common law marriage: 4 Johns, 52. 8 Paige 574. 3 Tex. 450. 8 B. Mon. 113. 18 Johns, 345. 23 N. Y. 90. 88 N. Y., 487. 91 N. Y. 451. 1 Hill 270. 1 Barb Ch. 241. 43 Iowa 228. 23 Minn. 528. 49 Miss. 357. 45 Md. 155. 9 Paige 611. 70 Ill. 484.)

It must be borne in mind that cohabitation and repute do not constitute a marriage, but are only evidence tending to raise a presumption of marriage of more or less strength, according to the circumstances of the case, and that the cohabitation must not be meretricious, but matrimonial, in order to give rise to this presumption.[2] The two essentials of a valid marriage are, capacity and consent. Marriage is a civil contract, and no ceremonial is indispensably requisite to its creation.[3]

It has been said that marriage although beginning in a contract, is a legal status, which may be modified from time to time by law.[4]

In a case where a man introduced a woman as his wife, and likewise gave her this paper: "I Her by aknolidg and own that I am maryed to Elsepeth Curriaa as soon as I got all things put to rights or my affairs are that I am not to see you in no ways distress, until that I provide for you which I hope will not be long. This is all from yours, David Trum-

[1] 70 Ill. 484. [2] 121 Ill. 388. 46 N. Y., Eq. 411. [3] 46 N. Y, Eq. 411. [4] 51 Me. 480. 5 Barb. 474. 9 Ind. 37. 4 R. I. 387. 40 Miss. 164.

bull." *Held*, a valid marriage. In a case where there were three distinct statements, thus: "We swear we will marry one another," and "I take you for my wife and swear never to marry another woman," followed by a repetition of the same: *Held*, a valid marriage.

In the celebrated Dalrymple case the man made and signed a document which reads thus: "I do hereby promise to marry you as soon as it is in my power, and never marry another." The woman added: "And I promise the same," signing it. This document was endorsed, "A sacred promise." A second document followed, reading thus: "I hereby declare that Johanna Gordon is my lawful wife," signed by him, and "I hereby acknowledge John Dalrymple as my lawful husband," signed by her. A third document read thus: "I hereby declare Johanna Gordon to be my lawful wife, and as such I shall acknowledge her the moment I have it in my power.—J. W. Dalrymple." "I hereby promise that nothing but the greatest necessity (necessity which—situation alone can justify) shall enforce me to declare this marriage.—J. Gordon (now) J. Dalrymple. Witness, Charlotte Gordon." The last two papers were enclosed in an envelope marked, "Sacred promises and engagements." *Held*, to constitute a valid marriage.

In a case where a woman had had a child, she went to the alleged father, who gave her the following paper: "My dear, as a full testimony of my regard and affection for you, I hereby agree and bind myself to be your real husband in all senses of the word, and expect only the common ceremony of the outward rule of marriage, and I do hereby bind and oblige myself to accept of you as my lawful wife and is ready and willing to accept the common rite here put in execution in a public manner; or, if that cannot be conveniently done, suiting to all parties, I am agreeable to accept to any measure you think proper yourself, so as we may be united together in marriage. To this I sign my name as your real husband." *Held*, to constitute a valid marriage.

The Catholic church holds that marriage is a sacrament and that its votaries must be married by a priest in orders; and it not infrequently occurs that two ceremonies are had, one by the ordinary methods of the existing civil law and one by the authority of the church. When Napoleon was about to wed Maria Louise he consulted his law advisers to ascertain whether, if an heir to the throne should be begotten before the sacerdotal ceremony was performed, it would be legitimate, and, on being answered in the affirmative, he mounted his horse and galloped to a place remote from Paris, met his affianced and consummated the marital union with no ceremony, although some days thereafter an elaborate sacerdotal ceremony was had in Paris. In England it was held by the House of Lords that a religious ceremony must be had, but that rule does not prevail in any of our States. Here, if a ceremony be desired, it may be as well performed by a civil officer, as a judge or justice of the peace, as a clergyman, although the prejudice of custom makes the latter course the one usually adopted. In foreign countries an United States consul can generally perform the ceremony. But it is now well settled that, except as changed by express statute, no clerical or lay intervention is any more necessary to form this contract than is needed to form any other civil contract. Two parties of contracting capacity are free to, themselves, make a binding contract, and no specific form is necessary, except in the States mentioned, nor is any more elaborate form or ceremony required in case of marriage except in the States named. If two persons having a contracting capacity should solemnly declare in presence of witnesses that they would take each other for husband and wife then and there, *per verba de presenti*, it would constitute a marriage, especially if they cohabited together thereafter, or if two parties having a contracting capacity should mutually say in presence of witnesses that they would thereafter become husband and wife, and then should thereafter, within a reasonable time, cohabit together, it would be held a valid marriage from time of cohabitation, *per verba de*

futuro cum copula. In New York city a man became acquainted with a girl who was employed in his sister's family, and courted her, and said to her that he didn't believe in marriage ceremonies, and that a marriage without was as valid; he then took her in a carriage, and, while riding, put a ring on a finger and said: "This is your wedding ring, we are married. I will live with you and take care of you all the days of my life." She accepted the ring and assented, and they drove to a house in Waverley Place, where he introduced her as his wife and lived with her as such for five weeks; then claimed that the union was flagitious and meretricious—but the court declared it a marriage; here there were no witnesses, but the attending circumstances of the ring and the introduction and living together as man and wife, sufficed. Witnesses are not essential, but always salutary, in order to furnish the required proof, as in cases of conflict each party would differ as to what happened. In some States a common law marriage is held invalid by statute, and cannot be available there; in most States a license is needed, but a marriage without one is good, even though performed by an officer or clergyman who is prohibited by law from celebrating it; it is, however, a misdemeanor in the officer. Proof of marriage when required may be made by any person who may have witnessed the ceremony, or by common reputation of having lived and cohabited together as husband and wife. If there be an official record, as a license with the certificate of the officiating officer, that will be received as evidence, but, unlike other record evidence, it is not regarded as the best evidence. Mr. Lamon, in his exhaustive Life of Lincoln, seems to consider it necessary to establish the marriage of his great friend, to find a record of the marriage, which was then not known, but which existed in Washington County; no such record evidence is necessary nor could it be adduced in one-third of the cases, extant. Many marriages are celebrated without license, and no record can be found of many more where there is a license. Officials neglect to make the return, and much carelessness exists

among custodians about them. I once searched in an office where a record of a marriage should have been, for three days, and found no trace of it. Hence record evidence is not only not required, but likewise is weak evidence, if found. The alleged marriage of Daniel Clark with Zulime de Carriere (Mrs. Gaines' father and mother) was proven by a sister of Zulime, who testified that in a Catholic church in Philadelphia she saw the ceremony performed: no corroborating proof existed—no priest, no church designated, nothing but her *ipse dixit* that she saw it, many years previously; yet the title to many millions of property depended on the truth or falsity of this statement. Many marriages, affecting vast property interests, have depended upon common reputation of neighbors that the parties were married. Confessions and admissions of the parties themselves are competent, but when made in the interests of the confessing parties are to be received with great caution, but when made against interest are binding as other admissions. Instances are on record of men rearing two distinct families by two distinct reputed wives. A prominent railway operator; also a prominent inventor, did so in New York; in fact, the latter had several families; of course all except the first marriage were spurious. A marriage of children under seven years of age, or when either is under seven, is absolutely void and a nullity in every State, but a marriage when one or both are between the ages of seven and twelve if a female or fourteen if a male (unless the statute changes it) is good as an *inchoate* marriage and, unless disaffirmed when the one of non-age reaches the age of legal consent, will be valid from such age of legal consent. The one under legal age of consent may, on reaching such age, confirm it by cohabitation or other acts, as kissing, sending flowers, declarations, or other similar acts, and when so ratified will be good, but, unless so ratified, will be treated as a disaffirmance, and will not thereafter be good. Fourteen in a male, and twelve in a female, are the ages of legal consent, and any marriage between parties having attained those ages

respectively, if otherwise qualified, will be valid, except in some States, where they are held to be void or voidable if unaccompanied by parental consent, or in some other States, where the age of legal consent has been extended to a later period, generally eighteen in a male and sixteen in a female. In the latter cases all other incidents attaching to age of legal consent apply to the prescribed conventional age.

A very common occurrence was and still is for affianced parties whose plans are interdicted at the place of domicil to repair to a jurisdiction where the marriage can be consummated. A little hamlet in Ohio, on the Ohio river, called Aberdeen, was such a place, and thither eloping parties came daily from Western Virginia, Kentucky and Ohio, for there was a blacksmith there who also was a justice of the peace, and who would at any hour of the day lay down his hammer or release the horse's hoof he was shoeing, or arise in the night, in order to splice two dissevered hearts, requiring no license and making no scrutiny, and thankfully accepting any fee that might be offered, from empty thanks or twenty-five cents to ten dollars.* In other places parties frequently cross State lines to avoid a prohibiting jurisdiction. Divorced persons in New York barred by a decree from remarrying, have but to pay four pennies for ferriage to Jersey City, then get married and return to New York, where the union is quite as valid as in New Jersey, nor are they punishable for contempt of court for the act. In some places local legislation has cured this solecism in practice. James Parton, the author, married "Fanny Fern," the authoress, who died, leaving an adult daughter by a former husband, whom Parton desired thereafter to marry, she also consenting. They resided at Newburyport, Mass., and on consulting a lawyer ascertained that it could not be done under the local law prevailing there, but it was not inhibited by the law of New York, hence they repaired to that jurisdiction and were married, and it was a

*His name was Shelton, and he married over five thousand couples. His successor in office, Massie Beasley, Esq., married 4,153 couples during sixteen years, up to the close of 1887.

valid marriage even in Massachusetts. Gretna Green was a hamlet in Scotland just across the line from England, and thither many marital pilgrims were wont to repair to avail themselves of the loose requirements there and to avoid the rigid formula demanded by the English law. An early marriage certificate extracted from the rustic and unofficial records reads thus, and was held good:

"GRITNA GREEN June 10, 1786.

"This is to sertfay to all persons that may be scurned that Charles Blount from Salisburey and Elisbith Ann Wyiche from the same place, both cumes before me and declares themselves to be both single persons, and is now mareyed by the way of the Chucrh of Scotland, as day and deet above mentioned by me.

DAVID MCFARSON,
C. B. BLOUNT,
ELIZBETH ANN WYCHE."

From the above suggestions I deduce, as a general rule, that marriage is recognized in all civilized countries, hence will be recognized in all, and a marriage valid in the place of its celebration will be valid everywhere. Such is the general rule, and it will be governed, controlled and construed by the *lex loci contractus*, or place where celebrated. Of course it must be a monogamous marriage; even when polygamy prevailed in Utah, no marriage of a latter-day saint was good outside of Utah, except the first one. A marriage which is clearly fraudulent, though valid by the *lex loci contractus*, would be invalid elsewhere; as, for example, in case of a fraudulent Utah divorce, the court having no jurisdiction if followed by a marriage in Utah where it was valid, it would not be valid elsewhere. The converse of the general rule is equally authentic, viz.: a marriage invalid by the law of the place where celebrated is invalid everywhere else, the *lex loci contractus* governing in that, as in the former case. Another rule is, that a marriage prohibited by decree, or the local law of the parties' domicil, will be good if celebrated elsewhere, but the parties themselves must be under no disability. The marriage of an insane person or an idiot, or one already

bound by a valid subsisting marriage, or within the prohibited degrees, or when party is impotent, or under seven years of age, and the like, would be void anywhere, and even if validated wholly or partially by the *lex loci contractus* would acquire no extra-territorial validity. In Memphis recently, Miss Mitchell, an unquestioned female, was betrothed in marriage to another unquestioned female; had the marriage been consummated in form it would nevertheless have been void. Why? Because the object of marriage, viz.: sexual intercourse and procreation, would have been impossible; and a marriage between an impotent person would have been void for the same reason. The marriage between an insane person or an idiot would be void by reason of lack of consent of the contracting party, thus handicapped. The invalidity by reason of consanguinity or of a prior marriage depends upon moral considerations acceptable in all civilized countries. The exceptions to the rule recognizing in other jurisdictions marriages which were valid by the *lex loci contractus*, are those involving polygamy and incest, those positively prohibited by the laws of a country from motives of policy, and those celebrated in foreign countries by parties entitling themselves, under special circumstances, to the benefit of the laws of their own country. As a rule, the first marriage of a person who thereafter believes in the right to, and does in fact add, other wives to his family circle, is good, but in England was discredited: and the law as to incest simply includes cases of that sort which by common consent are deemed incestuous, there being quite a disparity of opinion on the class of relations who might be legally and properly married.[1] Marriages between parents and children, brothers and sisters, uncles and nieces, aunts and nephews should not be tolerated anywhere, but marriages between first cousins and stepson and stepmother are allowed in some States and denied in others, and in the latter classes of cases it is believed that if a marriage between such parties should be valid by the *lex*

1 Story Conf. of Laws, 113.

loci contractus, it should also be valid everywhere. Of course in the case of prohibitions depending upon the positive laws of a country, they can only apply to the subjects of that country and celebrated in that country. Thus a marriage of a subject of Wurtemburg in Illinois, in violation of the positive law of Wurtemburg, was held valid in Illinois, and would have been held valid in all other Christian countries except Wurtemburg alone.[1]

The ground upon which the general rule of the validity of marriages, according to the *lex loci contractus*, is maintained is easily indicated:

"All civilized nations allow marriage contracts. They are *juris gentium*, and the subjects of all nations are equally concerned in them. Infinite mischief and confusion must necessarily arise to the subjects of all nations with respect to legitimacy, successions and other rights if the respective laws of different countries were only to be observed as to marriages contracted by the subjects of those countries abroad; and therefore all nations have consented, or are presumed to consent, for the common benefit and advantage, that such marriages shall be good or not, according to the laws of the country where they are celebrated. By observing this rule few if any inconveniences can arise. By disregarding it infinite mischief must ensue. Suppose, for instance, a marriage celebrated in France, according to the law of that country, should be held void in England—what would be the consequence? Each party might marry anew in the other country. In one country the issue would be deemed legitimate, in the other illegitimate. The French wife would in France be held the only wife, and entitled as such to all the rights of property appertaining to that relation. In England the English wife would hold the same exclusive rights and character. What, then, would be the confusion in regard to the personal property of the parties, in its own nature transitory, passing alternately from one country to the other? Suppose there should be issue of both marriages, and that all the parties should become domiciled in England or France —what confusion of rights, what embarrassment of personal and conjugal relations, must necessarily be created!"[2]

[1] 104 Ill., 35. [2] Story Conf. of Laws, Sec. 121.

In the case I have named of the marriage of an impotent person being valid where celebrated, yet void elsewhere, that cannot apply to an unadjudicated case. For example, if a marriage of an impotent person was rendered valid in the place of contract by failure to sue in time it would not be invalid in another jurisdiction until an adjudication was had, and the facts established.

An union formed between a man and woman in a foreign country, although it may there bear the name of marriage, and the parties to it may there be designated husband and wife, is not a valid marriage unless it be formed on the same basis as marriages throughout Christendom, and be in its essence "the voluntary union for life of one man and one woman, to the exclusion of all others." [1]

Marriage, as understood in Christendom, is the voluntary union for life of one man and one woman to the exclusion of all others. A marriage contracted in a country where polygamy is lawful between a man and woman who profess a faith which allows polygamy, is not a marriage as understood in Christendom, and, although it is a valid marriage by the *lex loci*, and, at the time when it was contracted, both the man and the woman were single and competent to contract marriage, the English Mat. Court will not recognize it as a valid marriage in a suit instituted by one of the parties against the other. [2]

In a suit between a British subject and a Japanese woman, in Japan, "evidence having been adduced which showed that the marriage was valid according to the law of Japan, and that, by such law, the petitioner was precluded from marrying another"—*held*, a valid marriage. [3]

A marriage solemnized in Illinois between subjects of a foreign country, domiciled here at the time, in strict conformity with our laws, and between parties competent under our laws to contract the relation, is valid and binding here

[1] 38 Ch. D. 220. [2] 1 P. and M. 130. [3] 15 P.D. 76.

notwithstanding such marriage is in violation of the positive law of the country of which they are subjects.[1]

Another rule is thus: if parties are stopping in a foreign country, and, under the law of the place, they cannot marry, they may, nevertheless, marry under the same conditions as they could at home, and it will be good at home. And still another rule is thus: if at the place a special law authorizing foreigners to marry in a special way exists, and it is so done, it will be good in the land of their domicil. A foreign consul can marry citizens of his country domiciled abroad. In some States whites and blacks cannot marry—such marriages are deemed void. Suppose that a white and black should marry in a State which authorizes it, and remove to a State which prohibited it, would it be legal there? I think, on principle, it would, but the authorities are divided—it would be legal in some States, and not so in others.

Let it be recollected, however, that these rules have reference only to the persons and their personal *status*, and do not apply to property, nor to divorce, nor to alimony. Those subjects are governed by different rules. I also should remark that, even in consideration of the main questions, some difficulties are also encountered, and a student of the subject will find some decisions, noticeably in New York, which are insolvable by any rule of rhyme or reason; in fact, some New York decisions are inharmonious with decisions elsewhere and stand out alone *sui generis* as amazing monuments of the glorious uncertainity of the law, and furnishing *quasi* authority for that recent interesting novel by Wilson, whose gravamen and moral is that one man may be the husband of his wife in one State, and another man may be her husband in another State, etc., all legal, as well. Not infrequently, controversies arise concerning priority or validity of marriage in which presumptions are required to effect a solution, and in those, like any other questions in civil controversies, the usual presumptions both of law and

[1] 104 Ill. 35.

fact are applicable. Thus, when parties are living and cohabiting together the presumption of innocence prevails, viz.: that they are married, and not that they are living adulterously together, and whoever desires to assert the latter must both avow and prove it. Again, it may be shown by general reputation, as *res gestae*, that parties are married, the general reputation of their neighbors being competent; then it is a presumption of law that an official has done his duty, and whenever that question arises in connection with marriage, as in other cases, the presumption holds good—as where a clerk is forbidden from issuing license to a minor, it is presumed he did not do so, or where a justice is debarred from marrying without a preliminary license, it is presumed it was granted. The presumption that an absent and unheard-of person does yet live for seven years from date of disappearance holds, hence remaining party not justified in marrying during that period, except as changed by statute, while the presumption that he or she is dead after seven years is equally strong, and a party is justified in remarrying after that period has elapsed, but marriage is void if first party turns up afterward. Sometimes the presumptions conflict, as, for example, the presumption of innocence may clash with the common reputation, which may be that the parties are illicitly connected, in which case the matter is at large, and all must then depend upon proof. A cohabitation illicitly begun can never ripen into marriage, unless some act or declaration of a change of condition is made which terminates the flagitiousness, and assumes the normal and innocent relation. I was once called on to advise concerning the status of a pair in high walks of life. They were wary, and when they joined their barks they expressly agreed together that it was not to be marriage, and, of course, it was not marriage. I may here suggest that no man or woman can be married against his or her will: hence no matter how long, persistent, notorious, or affectionate the cohabitation, unless the parties, each for himself and herself,

expressly agreed together that the union was one of marriage, it will not be so. The agreement need not be express, it may also be implied from circumstances, but it must be indubitable and clear; nor does it matter, in illustration of the principle, that one of the parties was cruelly deceived. A party may be proceeded against for seduction or breach of promise, in proper cases, but no marriage is possible, except as the result of two concurring minds, and if the nominal or putative assent of either or both is obtained by force, fraud, mistake of parties, threats, or duress, such marriage is voidable by the party aggrieved, and this anywhere, regardless, or by lack of any divorce law, on chancery principles in general.

This principle does not reach cases of ordinary deceit, as false representations as to credit, character, or fortune, or even chastity. Ante-nuptial unchastity on the part of either is no cause of divorce, except by statute in some States, and this, although it was made an issue in the courtship. Pregnancy before marriage is a statutory cause for divorce under conditions, as we shall see, and licentiousness of the male is so in one State, but the *rule* is as I have stated it, and the same rule will apply to deceit and mistake as to fortune and other matters. In cases of marriage in foreign States, the *lex loci*, or place of the court or jurisdiction, will supply the rules for adjudication. And where a party is desirous to invoke the *lex loci contractus*, the *lex domicilii* or the *lex rei sitae*, he must aver and prove it. The courts of any country are presumed to be only acquainted with its own laws—those of other countries are to be averred and proved, like any other facts of which courts do not take judicial notice; they may be generally proved by official printed statutes, or under the attestation of the Secretary of State, or other custodian of those laws; if, however, they be not statutory laws, they may be proven by the nuncupative testimony of persons learned in the law of that country or nation, the same in cases of marriage as in other cases. Anybody relying on foreign law

must prove it: courts will not take judicial notice of it. The legal presumption of our courts is that common law prevails in all of our States, except Louisiana, also in English speaking countries, and that the civil law prevails in Louisiana and the continent of Europe. But although courts will take notice of the common law they will not take notice of the civil law—that must be established by proof of experts in that law; even an assumed printed copy of the Pandects of Justinian or of the Code Napoleon would not prove themselves—they must have the suppletory oath of some lawyer of the civil law, or of the great seal and signature, or of the Secretary of State of the country in question, but the Louisiana civil code will prove itself.

A marriage in fun is a nullity of itself, although parties might be involved when not so designed. I once procured in Chicago a divorce for a Brooklyn, N. Y., girl, who got unintentionally married as the result of a foolish banter between herself and a young man whom she despised. It proved unfortunate, of course.

On December 20th, 1878, an act was passed by the South Carolina legislature legalizing all divorces under the law which the *negro* legislatures had enacted, but forbidding divorces in future. The New England idea regarding marriage, was, that it was a divine institution, similar to the idea of the Roman church, but when divorces got into the civil courts they found it necessary to term it a civil contract, and since then it has been designated as a *status*, or *condition*, or *relation*.

There can be no indefinite or doubtful position in this relation; parties are either *married* or *not* married; an agreement to marry is not marriage, nor can any court decree a specific performance of marriage; a recalcitrant party may be sued for seduction, bastardy or breach of promise, but no result can be attained except an award of money damages. If a party is forced to marry to get rid of a bastardy charge, or an irate father, such marriage is voidable at his election,

on principle, although it has been held good by some courts. In a ceremonial marriage, upon the bride uttering the cabalistic phrase "I will," the marriage is of force, nor need the officer pronounce it so—it is so *ipso facto*; in an unceremonial marriage the moment the two parties mutually agree to be *then* husband and wife, from that moment they are so; the marriage, however, is only technically, but not *actually* consummated till cohabitation following those incidents, has taken place; if parties agree to marry when they cohabit in the future (*per verba de futuro cum copula*) then when the copula is complete *that* instant they are married—the change from one condition to the other is instantaneous. Suppose, however, that after the ceremony is performed or the contract *per verba de presenti* is made, that no cohabitation ever occurs. What condition are the parties in? That depends wholly on the reason why cohabitation did not take place. If the reason was the impotency of either party, the marriage is generally void, but, at all events, voidable as a rule; in such case no marital or property consequences would result; if, however, there was no other impediment to the marriage, and the parties were physically able to consummate the marriage, they still would be married, despite the non-cohabitation. Of course, in case of a non-ceremonial contract, the failure of cohabitation would afford a very strong presumption that the parties did not make a contract of marriage, and such a contract not followed by cohabitation could be set aside, without much effort; in fact, some authorities are to the effect that cohabitation is of the essence of a non-ceremonial marriage, but I think that in a well attested case of a *contract de presenti* it would be valid even though not followed by cohabitation. It is different, however, in a contract for future marriage: the parties then say in substance: "We will be inter married together next month," or "as soon as I can earn one hundred dollars," or "when I return from New York," or "as soon as we can get ready," or "make suitable arrangements," and within a reasonable time thereafter or after he returns from

New York, the parties cohabit—in such case, when the cohabitation is complete, the marriage is consummate; and the cohabitation may be presumed from circumstances, as that they slept together, or took a trip together, with opportunity to cohabit.

Marriage may be proven by reputation, declaration and conduct of the parties.

Every intendment of law is in favor of marriage.[1]

A foreign marriage, valid according to the law of the country where celebrated, is good everywhere, but this applies only to the form and not essentials of the contract, which depend on the *lex domicilii*, i. e., the law of the country where the parties are then domiciled, and in which they contemplate to reside.[2]

Everything is presumed in favor of validity of marriage.[3]

The general rule that a marriage valid where celebrated is valid everywhere, as a general rule is qualified to the extent that the forms of entering into the contract are regulated by the *lex loci contractus*; the essentials of the contract depend upon the *lex domicilii*, so that if contrary to the law of the domicil is void. The exceptions to the rule are marriages involving polygamy, incest and those prohibited by the laws of the State or incapacity of the parties to contract.

The following is believed to embody the correct principle: "All nations have consented, or must be presumed to consent, for the common benefit and advantage, that marriages should be good or not according to the law of the country where they are made. By obeying this law, no inconvenience can arise."[4]

New York, Michigan, Wisconsin, Minnesota and Nevada have each defined marriage to be a *civil contract*, so far as its validity is concerned; Indiana, Oregon and Washington have defined it to be a civil contract merely; Colorado and Kansas have each defined it to a civil contract to which the consent of parties is necessary; Iowa, Arkansas, Louisiana, New Mexico, Wyoming, Missouri, Montana and Nebraska have each defined it as a civil contract to which the consent of

[1] 2 Green, Ev. 462. [2] 9 H. L. Cas, 193. [3] 1 K. 1 J. 4. [4] 2 Mag. Mon. 395.

parties capable in law of contracting is necessary. The other States have no statute laws on the subject, except California, Dakota and Idaho, which provide that marriage is a personal relation arising out of a civil contract to which the consent of parties capable of making it is necessary. The ages of legal consent to marriage are thus in the various States:

	Male.	Female.		Male.	Female.
Alabama,	17	14	Nebraska,	18	16
Arkansas,	17	14	Nevada,	18	16
California,	18	15	New Hampshire,	14	13
Delaware,	18	16	New Mexico,	18	15
Georgia,	17	14	New York,	18	16
Illinois,	17	14	North Carolina,	16	14
Indiana,	18	16	Ohio,	18	16
Iowa,	16	14	Oregon,	18	15
Kansas,	15	12	Texas,	16	14
Kentucky	14	12	Utah,	14	12
Louisiana,	14	12	Virginia,	14	12
Michigan,	18	16	West Virginia,	14	12
Minnesota,	18	15	Wisconsin,	18	15
Missouri,	15	12	Wyoming,	18	16
Montana,	18	16			

Until the parties have reached the ages respectively of manhood and womanhood, which is usually 21 for a male and eighteen for a female, the consent of parents or guardian is necessary, but if the marriage takes place after the age of legal consent of the parties, and then without the consent of the parents, it will be valid, in the absence of statute. In most of the States, to make a marriage formal and regular, a license and ceremony are required, but marriage is good without the license, and if properly avouched, without the ceremony also except as changed by statute, provided the parties have actually agreed to be married, and in pursuance of that agreement have freely cohabited together.

The following is a list of persons held by canonical laws to be incapable of entering into the matrimonial relation, viz.:

A man may not marry his

Grandmother.
Grandfather's wife.
Wife's mother. *
Wife's grandmother.
Father's sister. *
Mother's sister. *
Father's brother's wife. *
Mother's brother's wife. *
Wife's brother's daughter.
Wife's sister's daughter.
Wife's father's sister.
Wife's mother's sister.
Wife's daughter. *
Son's wife.*
Wife's sister.*
Brother's wife.*
Son's daughter.*
Daughter's daughter.*
Brother's son's wife.
Sister's son's wife.
Mother.*
Stepmother.*
Daughter.
Sister.*
Son's son's wife.
Daughter's son's wife.
Wife's son's daughter.
Wife's daughter's daughter.
Brother's daughter.
Sister's daughter.

And a woman may not marry her

Grandfather.
Grandmother's husband.
Husband's grandfather.
Father.*
Stepfather.
Husband's father.
Brother's son.
Sister's son.
Husband's brother's son.
Husband's sister's son.
Father's brother.*
Mother's brother.
Husband's father's brother.
Husband's mother's brother.
Son's son.
Daughter's son.
Husband's son's son.
Husband's daughter's son.
Brother's daughter's husband.
Sister's daughter's husband.
Father's sister's husband.
Mother's sister's husband.
Son.
Husband's son.
Daughter's husband.
Brother.
Husband's brother.
Sister's husband.
Son's daughter's husband.
Daughter's daughter's husband.

But in our country death does away with the prohibition of affinity as a rule, although, as I have said, it was found, some years ago, that James Parton, the author, could not in Massachusetts marry his deceased wife's daughter, so the pair resorted to New York, where there was no law. And in many of the States there are statutory provisions which inhibit marriages within the canonical degrees of consanguinity

*Also void under the Levitical law.

or affinity, which see. Also the consequences of violating them.

An assumed marriage between an uncle and niece, or an aunt and nephew, is expressly made void by statute in the following States, viz.: Alabama, Arkansas, Arizona, California, Colorado, Connecticut, Delaware, Idaho, Indiana, Illinois, Iowa, Kansas, Maine, Maryland, Massachusetts, Minnesota, Michigan, Mississippi, Missouri, Montana, New Hampshire, New Jersey, Nevada, Nebraska, North Carolina, Dakota, New Mexico, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Vermont, Virginia, West Virginia, Washington, Wisconsin, Wyoming; nor is a marriage between first cousins authorized in Arizona, Arkansas, Colorado, Illinois, Indiana, Kansas, Missouri, Montana, Nevada, New Hampshire, the Dakotas, Ohio, Oregon, Washington and Wyoming.

Prohibited degrees differ considerably in different States. In Maine, Massachusetts, Michigan, South Carolina and Vermont, persons are forbidden to marry the following:

Mother.	Wife's mother.
Sister.	Grandmother.
Wife's Grandmother.	Sister's daughter.
Daughter.	Wife's daughter.
Granddaughter.	Wife's granddaughter.
Stepmother.	Brother's daughter.
Grandfather's wife.	Sister's daughter.
Son's wife.	Father's sister.
Grandson's wife.	Mother's sister.

No female shall marry her corresponding relatives.

In Arizona, Arkansas, Colorado, Illinois, Kansas and Wyoming the prohibition is thus: Parents, children, grandparents and grandchildren of every degree, brothers and sisters of half or whole blood, uncles and nieces, aunts and nephews and first cousins. In Missouri, California, Idaho, New Mexico, Nebraska and Utah, marriages are prohibited between parents and children, ancestors and descendants of every degree, brothers and sisters of the whole and half

blood, uncles and nieces and aunts and nephews. In Dakota the same; and cousins of half blood or whole blood, stepfather and stepdaughter and stepmother and stepson. In Florida, the Levitical degrees govern. In Georgia, same; and stepmother, mother-in-law, daughter-in-law, stepdaughter, granddaughter of his wife. A woman's corresponding relations. In Nevada, Ohio, Montana and Indiana persons not nearer of kin than second cousins may marry. In Oregon, Minnesota, Wisconsin and North Carolina marriage is prohibited between persons nearer than first cousins, computing by rules of civil law. In Alabama the prohibition is thus: Mother, stepmother, aunt or uncle's widow, sister, half-sister, niece, daughter, granddaughter, son's widow, wife's daughter, son's daughter. Corresponding relatives barred to female. In Connecticut a man can't marry mother, grandmother, granddaughter, sister, aunt, niece, stepmother, stepdaughter. No female can marry her father's son, grandfather, grandson, son, brother, uncle, nephew, stepfather, stepson. In Rhode Island, Maryland, New Jersey and District of Columbia the prohibition is thus, viz.: Grandmother, grandfather's wife, wife's grandmother, father's sister, mother's sister, stepmother, mother, wife's mother, daughter, wife's daughter, sister, son's wife, son's daughter, daughter's daughter, son's son's wife, daughter, son's wife, wife's son's daughter, wife's daughter's daughter, brother's daughter, sister's daughter. Corresponding relatives are prohibited to the female. In Delaware, no man can marry his grandmother, grandfather's wife, wife's grandmother, aunt, son's wife, sister's son's daughter, daughter's daughter, son's son's wife, daughter's son's wife, mother's stepmother, wife's mother, daughter's wife's daughter, wife's son's daughter, wife's daughter's daughter, brother's daughter, sister's daughter. A female is prohibited from corresponding relatives. In New Hampshire and Iowa marriage is prohibited between a man and his aunt, father's widow, wife's mother, daughter, wife's daughter, son's widow, sister, son's daughter, daugh-

ter's daughter, son's son's widow, daughter's son's widow, brother's daughter, or sister's daughter, and between a female and her uncle, mother's husband, husband's father's son, husband's son, daughter's husband, brother, son's son, daughter's son, son's daughter's husband, daughter's daughter's husband, brother's son, sister's son, and in New Hampshire first cousins also. In Virginia and West Virginia a man cannot marry his mother, grandmother, stepmother, sister, daughter, granddaughter, half-sister, aunt, son's widow, wife's daughter, or her granddaughter or stepdaughter's brother's daughter or sister's daughter, and a female cannot marry corresponding relatives, nor husband of her brother's or sister's daughter. In New York marriage is prohibited between parents and children, including grandparents and grandchildren of every degree, ascending and descending, and between brothers and sisters of the half as well as the whole blood. In Pennsylvania a man cannot marry his mother, father's sister, mother's sister, sister, daughter, daughter of his son or daughter, father's wife, son's wife, wife's daughter, or daughter of his wife's son or daughter, and a female may not marry her corresponding relatives. In Kentucky a man may not marry his mother's grandmother's sister, daughter or granddaughter, nor the widow or divorced wife of his father, grandfather, son or grandson, nor the daughter, granddaughter, mother or grandmother of his wife, nor the daughter or granddaughter of his brother or sister, nor the sister of his father or mother, and a female shall not marry her corresponding relatives. In Mississippi a man shall not marry his mother or step-mother, sister, daughter, granddaughter, his half-sister or aunt, son's widow, wife's daughter or wife's granddaughter, or his niece; and a female is correspondingly prohibited. In Louisiana marriage is barred between lineal ancestors and descendants and brothers and sisters of the half or whole blood, uncles and nieces and aunts and nephews. In Tennessee, marriage is prohibited between lineal ancestor and descendant, and the lineal an-

marriage between unbelievers becomes dissolved if one of the parties becomes a Christian and makes a valid Christian marriage, provided the unconverted unbelieving spouse will not continue the marriage relation with the other, or will not continue it without reviling the Creator. A valid Christian marriage not consummated may be dissolved by the spiritual death of one of the parties, who takes the vows of a religious order, or by a dispensation of the Pope.

LICENSE AND CONSENT

In Maine the town clerk issues the license, the fee being 50 cents, and the marriage intentions must be filed in the office five days before issue of license.[1] In New Hampshire the town clerk issues the license, the fee being one dollar, and the intentions must be filed in the office of issue before the license granted.[2] In Vermont the town clerk issues the license, which must be issued in the town in which the groom lives if he lives in the State—if not, then in the town where the bride lives; if neither live in the State then in the town where the marriage is solemnized: fee, 50 cents.[3] In Massachusetts the town clerk or registrar issues the license; fee, 50 cents; he should inquire concerning age and competency; notice of intention must be filed in office before license is issued.[4] In Rhode Island the town or city clerk issues (in Providence, the registrar of births, marriages and deaths); fee, 50 cents; the officer should ascertain age and competency of parties to contract; it must issue in town or city where the parties reside, and if any objection to the marriage is made in writing the ceremony cannot proceed till objection be removed.[5] In Connecticut the registrar of births, marriages and deaths issues; it must be in the town where the marriage is to be celebrated, and the officer must make inquiry as to the age and competency of the parties.[6] In all the New England States the authority is termed a *certificate*. In New York and New Jersey no license is required. In Pennsylvania the clerk of

[1] Rev. Stat., Maine, 1883. [2] Gen. Laws, 1878, N. H. [3] Rev. Laws, Vt. 1880. [4] Pub. Laws, Mass., 1882. [5] Pub. Stat., R. I., 1882. [6] New Stat., Conn., 1888.

the Orphan's court issues, the charge being 50 cents, and 50 cents additional if one parent's consent, and 50 cents more if both parents' consent, is required; license must issue from county where marriage is to be celebrated and clerk must examine parties as to the legality of marriage proposed.[1] Parties may get special license to marry themselves, which the Quakers always do. In Delaware clerk or justice of the peace may issue, the fee varying from $2.33 to $2.83, according to locality. Bond required that parties are entitled to marry. No license is required if banns have been published twice in church.[2] Maryland license is issued by the clerk of circuit court and in Baltimore by clerk of court of common pleas; fee, $1.00. It must issue in county where ceremony is to take place. Clerk must examine parties under oath as to validity of the proposed marriage. No license required if banns have been published three times. Quakers may marry without license.[3] Virginia, the clerk of county, city or corporation court may issue, the fee being $1.00; it must issue from the place where the bride lives.[4] In West Virginia the clerk of the county court where the bride resides may issue; fee, $1.00.[5] In North Carolina the registrar of deeds issues; fee $1.50. License must issue in county where marriage is to take place and officer must ascertain age and competency of parties.[6] In South Carolina no license required.[7] In Georgia the ordinary, or clerk to ordinary, issues; fee, $1.50. Officer must ascertain age and competency of parties, and license must issue in county where bride lives, but no license is required if there has been publications of banns.[8] In Florida clerk of circuit court issues; fee, $2.00, license to issue in county where woman resides.[9] In Alabama the probate judge of the county where the woman resides issues; fee, $1.50.[10] In Mississippi the clerk of the circuit court where the woman resides issues; fee, $3.00, and a bond is required of legality of marriage.[11] In Louisiana clerk of the district court;

[1] Bright. Dig., 1883, Penn. Laws. [2] Rev. Stat., Del., 1884. [3] Rev. Code, Md., 1878. [4] Code, Va., 1887. [5] Code, W. Va., 1887. [6] Code, 1883, N. C. [7] Gen. Stat., 1882. [8] Code, Ga., 1882. [9] McClellan's Dig., 1881. [10] Rev. Code, 1886, Ala. [11] Rev, Code, Miss., 1880.

in New Orleans by Board of Health and judges of city courts; fee, $2.00. Bond required of validity of marriage, license to issue in county where marriage is to occur, hearing to be had before judge if opposition be made.[1] In Texas the clerk of county court issues; fee $1.50.[2] In Arkansas clerk of county court issues; fee $2.50; bond required for validity of marriage In Kentucky county clerk issues; fee, $1.50. County where female resides.[3] In Tennessee, clerk of county court issues; fee, $1.00; party must give bond as to validity and license must issue in county where bride lives or where marriage is solemnized.[4] In Missouri the county recorder issues the license; fee, $1.00. In St. Louis it is issued by the recorder. The officer must ascertain the age and competency of the parties.[5] In Ohio the probate judge issues in county where woman lives; fee, 75 cents; license not required if banns are published where woman lives, twice. Officer must examine as to age and competency.[6] In Michigan the county clerk issues; fee, 50 cents; he should examine as to age and competency of parties; must issue in county where one of the parties resides.[7] In Indiana the clerk of the circuit court issues; fee, $2.00. He should examine as to age and competency of parties; license not required from Quakers.[8] In Illinois the license is issued by the county clerk where marriage is to come off; fee, in Chicago $1.50, elsewhere $1.00; he must examine as to age and competency.[9] In Wisconsin, no license.[10] In Minnesota the clerk of the district court issues; fee, $1.00 in Minneapolis, $1.50 in St. Paul, $2.00 elsewhere; clerk must examine as to age, etc.; license to issue in county where female resides, or, if she be a non-resident, in the county where marriage is celebrated.[11] In Iowa clerk of circuit court issues; fee, $1.00; license to issue in county where marriage occurs, and clerk must inquire into age, etc.; no license required for Quakers.[12] In Kansas the

[1] Rev. Civ. Code, La., 1887. [2] Rev. Stat., 1879, Tex. [3] Gen. Stat., Ky., 1883. [4] Code, 1884, Tenn. [5] Rev. Stat., Mo., 1879. [6] Rev. Stat., 1886, Ohio. [7] Howell's An. Stat., 1882., Mich. [8] Rev. Stat., 1881. Indiana. [9] S. & C. An. Stat., Ill., 1885. [10] Rev. Stat., 1878, Wis. [11] Gen. Stat., 1883, Minn. [12] McClain's An. Stat., 1884.

probate judge of "proper" county issues; fee, $2.00, but none required of Quakers; judge required to ascertain age, etc.[1] In Nebraska the county judge where marriage is to take place, issues; fee, $1.50, and judge should make inquiry as to age, etc. In Colorado county clerk issues; fee, $1.00, and he must examine as to age and competency.[2] In Utah clerk of probate court of county where female resides issues; fee, $2.25, and clerk must inquire as to age, etc.[3] In Arizona the county recorder issues; fee, $2.50.[4] In California the county clerk of county where marriage is to be celebrated issues; fee, $2.00; clerk must inquire as to age, etc.; where unmarried persons have lived together as man and wife they may be married with no license.[5] In Oregon the county clerk issues, unless banns have been published twice, when none required; fee $2.00 to $2.67, according to locality; must issue where woman lives; officer must inquire as to age, etc.[6] In District of Columbia clerk of Supreme Court issues; fee, $1.00.[7] In Montana the probate judge issues; fee, $2.00; he must issue where marriage is to occur, and must scrutinize as to age and competency.[8] In Nevada the county clerk issues; fee, $2.00; he must scrutinize as to age and competency of parties and it must emanate from the county where one of the parties live.[9] In Washington the county auditor issues; fee, $3.00.[10] In Wyoming the county clerk of the county where marriage is to take place, issues, and he must inquire into age, etc.; fee, $2.00.[11] In Idaho, New Mexico and the Dakotas, no license is required.

Verbal or written consent of parents or guardian is required when parties are of non-age in Alabama, Arkansas, Kentucky, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Jersey, New Mexico, Ohio, Pennsylvania, Utah, Virginia, West Virginia, Wisconsin, and Wyoming. Written consent is required in California,

[1] Com. Laws 1885, Kansas. [2] Gen. Stat., 1883, Colo. [3] Com. Laws, 1888, Utah. [4] Arizona Rev. Stat., 1887. [5] Deering's Code, Cal., 1885. [6] Hill's An. Laws, 1887, Oregon. [7] U. S. Stat. at Large. [8] Com. Laws, Mont., 1887. [9] Gen. Stat., Nev., 1885. [10] Code, 1881, Wash. [11] Rev. Stat., Wyo, 1887.

Connecticut, Georgia, Iowa, Maine, Montana, North Carolina, Oregon, Rhode Island, Vermont and Washington. In Kansas, Michigan, New Hampshire, New York and South Carolina, and States not named, no specifications made.

MARRIAGE AFTER DIVORCE.

In New York the defendant convicted of adultery cannot remarry till the death of the plaintiff, but the court may allow defendant to remarry after remarriage of plaintiff, if five years have elapsed. Plaintiff may remarry at any time. In Vermont the defendant cannot marry within three years from decree. In Massachusetts defendant cannot marry for two years from date of decree. In Louisiana the defendant, when adultery is charged, cannot marry the co-respondent. It would be bigamy. Nor can the wife marry for ten months after decree for any reason. In the Dakotas, if the decree be for adultery, the plaintiff may marry again, but the defendant can marry none but the plaintiff, till death of plaintiff. In Indiana, when notice is by publication, the plaintiff cannot marry again for two years. In Kansas, neither party can marry for six months, nor till decision of upper court, if appeal is taken. In Georgia the question of remarriage is referred to a jury. In Alabama the court may allow a remarriage. In Maryland the court may order that the defendant cannot remarry during life of plaintiff, when the charge was adultery or abandonment. In Delaware the defendant cannot marry the co-respondent in adultery. In Michigan the court may bar a remarriage of defendant for a term less than two years. In Mississippi the court may order that the defendant in adultery cannot remarry. In Nebraska the remarriage of plaintiff is not permitted till time exhausted for an appeal, and, if taken, not till its determination. Same in Oregon and Washington as to both parties. In Pennsylvania and Tennessee, if the divorce is for adultery, the defendant cannot marry the co-respondent during life of plaintiff. In Virginia, if the divorce is for adultery, the guilty party may be prohibited from remarrying, but such order may be

revoked by the court. In New Hampshire, Minnesota, Wisconsin, New Jersey, Missouri, Florida, Illinois, Wyoming, Iowa, Montana, Texas, Colorado, West Virginia, Nevada and Maine it is provided that no punishment shall be had for adultery or bigamy if parties lawfully divorced shall marry again. And in Connecticut, Rhode Island, California, Arkansas, Texas, North Carolina, Arizona, Kentucky and Idaho no restriction is made upon remarriage after divorce.

But any provision restraining marriage is a *brutem fulmen*, as a rule, inasmuch as prohibited parties can repair to another State and remarry, and return to the State of the prohibition if they desire, and the marriage will be valid everywhere. They will not even be punished for a contempt of court. But some recent statutes have changed this.

VALIDITY OF MARRIAGES CONTRACTED BEYOND THE STATE.

In Nebraska, Kansas, Kentucky, California, Dakota, Utah, Wyoming, New Mexico, Arizona, Idaho, Montana, Arkansas, Colorado, their statutes provide that marriage contracted beyond the boundaries thereof, if valid where contracted, are also valid in those States, respectively, but in Arkansas there is this proviso—that the parties must actually have resided in the State or county where the marriage was contracted, and in Colorado it is further provided that neither polygamy nor bigamy shall be allowed in the State. In Delaware it is provided that, if parties to any marriage prohibited for consanguinity or affinity or for miscegenation, shall cohabit as man and wife, then they shall be punished as for a misdemeanor. In Georgia it is enacted that all marriages, solemnized in another State by parties intending at that time to reside in Georgia, shall have the same legal consequences and effect as if celebrated in Georgia, and that parties cannot evade the Georgia laws by marriage in another State. In Virginia no validity is given to incestuous or bigamous marriages or those void for miscegenation by their being entered into outside the State to evade the local law. In Mississippi marriages which are void for miscegenation acquire no valid-

ity by parties being married outside the State to avoid the local law. The same rule is observed in North Carolina by decision. In Maine and Massachusetts, marriages are void, and in West Virginia they are voidable, if citizens of those States, intending to return, go into another State and are married with the design to evade the law against bigamous or incestuous marriages or against a marriage with an idiot or a lunatic, and afterward return to the State of their domicil.

FORM OF CEREMONY.

In New York no license nor ceremony is necessary, except that the parties shall declare in presence of witnesses that they take each other as husband and wife, but a ceremony may be had. In Arizona all persons who live together as husband and wife for one year shall be considered as lawfully married. In New Hampshire parties cohabiting and acknowledging each other as husband and wife and generally reputed as such for three years, or until the death of one, shall be deemed as legally married. In Dakota and California parties married without a ceremony must make a joint declaration of marriage setting forth the names, ages and residences of the parties, the fact of marriage, the date, and that they are married. Form is not material, and it must be acknowledged and recorded like a deed of land. Quakers may everywhere be married according to the form incident to their society.

In California and Idaho the person performing the marriage ceremony must have personal knowledge of, or ascertain beforehand, the names, residences and identity of the parties, their legal right to marry and that parental consent is obtained if needful; in Dakota the officer must ascertain the same and that they are of legal age, also the names and residences of witnesses. In New York, Wisconsin, Minnesota and New Mexico the officer must ascertain if the parties are legally competent to marry. In case of a minor in Ohio the officer must either have a license, or ascertain that parental consent is obtained and that the banns have been published. In New York and Dakota one witness at least is required; in Rhode

Island, Oregon, Washington, Nevada, Wisconsin, Nebraska, Idaho, Wyoming, Montana, Minnesota and Michigan, two witnesses are required, and in Louisiana three witnesses. When the parties dispense with a ceremony, as they may, two witnesses must be had. No other State makes a requirement for witnesses. In New York, Arkansas and Mississippi, if a ceremonial marriage is had, it should be according to the form and custom of the church to which he belongs. In North Carolina the consent of the parties presently to take each other as husband and wife, freely, seriously and plainly expressed by each in presence of the officer, and the declaration by him that they are husband and wife. In Pennsylvania, Michigan, Minnesota, Dakota, California, Idaho, Nebraska, Nevada, Oregon, Tennessee, Washington, Wisconsin and Wyoming no express form is required except that the parties shall respectively declare in presence of the person officiating, and of witnesses when they are required, that they take each other as husband and wife. In Indiana no marriage shall be invalid for want of proper formalities if the parties believed it correct at the time; same in California, Dakota and Idaho. In Maine, New Hampshire and Massachusetts no marriage shall be invalid by any omission of the notice to marry. In Michigan, Oregon, Utah, Massachusetts, Delaware, Wyoming, Georgia, Minnesota, Vermont, Maine, New Hampshire, Wisconsin, Virginia, Idaho, Montana, Kentucky, West Virginia, Nevada, Nebraska, Washington, Indiana, it is provided in general terms that no marriage entered into in good faith shall be affected by reason of non-authorization of officer if the parties believe themselves to be lawfully married.

In New York and Dakota, Indians may lawfully marry according to their customs.

Legal fees vary from one dollar to five dollars; it is customary (but a foolish custom) to pay more.

The Shakers practiced celibacy strictly and honestly; the Zoarites followed the creeds of the Apostolic Essenes; and used marriage as a strict utility to perpetuate the race, their

canon being thus: "All intercourse of the sexes, except what is necessary to the perpetuation of the species, we hold to be sinful and contrary to the order and command of God. Complete virginity or entire cessation of sexual commerce is more commendable than marriage." Yet they seem to have married, for one of their canons provides that "our marriages are contracted by mutual consent and before witnesses. They are then notified to the political authority, and we reject all intervention of priests or preachers."

The Oneida community, at Oneida, New York (now disbanded) adopted promiscuity, and sexual alliances were temporary, i. e., for one single night. The Quaker system of celibacy or the practices of the Essenes were not inharmonious with the law, but the vulgar practices of the Oneida community were; they were obliged to yield to the pressure of popular opinion at last and disband.

And thus it will appear that no principle but the monogamic will be suffered to prevail in our country, although the loose rein given to many alliances by the necessities of divorce law makes possible many marital partners. Four is not uncommon in swift succession, and I have known of one person who had eight. As to property rights depending upon the law of domicil and conflicting domicils in cases of removal, the law (in absence of statute) has been thus summarized: Where there is a marriage between parties in a foreign country, and an express contract respecting their rights and property, present and future, that as a matter of contract will be held equally valid everywhere, unless under the circumstances it stands prohibited by the laws of the country where it is sought to be enforced. It will act directly on movable property everywhere. But as to immovable property in a foreign territory it will at most, confer only a right of action, to be enforced according to the jurisprudence *rei sitae*.

Where such an express contract applies in terms or intent only to personal property, and there is a change of domicil,

the law of the actual domicil will govern the rights of the parties as to all future acquisitions.

Where there is no express contract, the law of the matrimonial domicil will govern as to all the rights of the parties to their present property in that place and as to all personal property everywhere, on the principle that movables have no *situs*, or rather that they accompany the persons everywhere. As to immovable property, the law *rei sitae* will prevail.

Where there is no change of domicil, the same rule will apply to future acquisitions as to present property. But where there is a change of domicil the law of the actual domicil, and not of the matrimonial domicil, will govern as to all future acquisitions of movable property, and as to all immovable property, the law *rei sitae*.

And here also, as in cases of express contract, the exception is to be understood, that the laws of the place where the rights are sought to be enforced do not prohibit such arrangements. For if they do as every nation has a right to, prescribe rules for the government of all persons and property within its own territorial limits, its own law in a case of conflict, ought to prevail.

Although in a general sense, the law of matrimonial domicil is to govern in relation to the incidents and effects of marriage, yet this doctrine must be received with many qualifications and exceptions. No other nation will recognize such incidents or effects when they are incompatible with its own policy, or injurious to its own interests. A marriage in France or Prussia may be dissolved for incompatibility of temper, but no divorce would be granted from such a marriage for such a cause in England, Scotland or America. * * * The doctrine of tacit consent to regulate the rights and duties of matrimony in cases where there is no express contract according to the law of the place where the marriage has been celebrated, is questionable in itself, and even if admitted, must be liable to many qualifications and restrictions. We have seen that it has been much doubted in Louisiana, and the Scottish

courts have utterly refused to allow the doctrine of such a tacit contract to regulate the right of divorce. [1]

Of course the statutes of the most of the States made radical changes in the law.

1 Story's Conf. Laws, Secs. 184 to 190.

III.

DIVORCE.

He counsels a divorce: a loss of her,
That like a jewel has hung twenty years
About his neck, yet never lost her lustre;
Of her that loves him with that excellence
That angels love good men with. —*Shaks.*

Sir, call to mind
That I have been your wife in this obedience
Upward of twenty years, and have been bless'd
With many children by you. If, in the course
And process of this time you can report,
And prove it, too, against mine honor aught,
My bond to wedlock, or my love and duty,
Against your sacred person, in God's name
Turn me away; and let the foul'st contempt
Shut door upon me. —*Shaks.*

The reason why so few marriages are happy is because young ladies spend their time in making nets, not in making cages.
—*Dean Swift.*

For what is wedlock forced but a hell,
An age of discord and continual strife?
Whereas the contrary bringest bliss,
And is a pattern of celestial peace. —*Shaks.*

Divorce is an outbursting, a liberation, a step to something better.
—*A. J. Davis.*

Divorce is a popular generic term to indicate in general, all methods of judicial declaration that a marriage is at an end, but it is also a specific term to designate but one mode of such termination, the subject being divisible into the following parts, viz.:

1. Judicial declaration of nullity of marriage *ipso facto*.

2. Judicial decree of a nullity of marriage by force of a decree.

3. Divorce *a vinculo matrimonii* (from the bonds of matrimony).

4. Divorce *a mensa et thoro* (from bed and board).

Then there may be a suit for *jactitation* of marriage, which is an inverse action brought to overthrow a false pretension of marriage; and there may be a suit for separate maintenance or alimony, dissevered entirely from suit for nullity or divorce.

Under the old Jewish dispensation: "When a man hath taken a wife and married her, and it came to pass that she found no favor in his eyes, because he hath found some uncleanness in her, then let him write her a bill of divorcement, and give it in her hand, and send her out of his house; and when she is departed out of his house, she may go and be another man's wife; and if the latter husband hate her, and write her a bill of divorcement, and giveth it into her hand, and sendeth her out of his house, * * * her former husband * * * may not take her again to be his wife;"[1] but the Savior's commentary on that law was: That whosoever shall put away his wife saving for the cause of fornication causeth her to commit adultery, and whosoever shall marry her that is divorced committeth adultery.[2]

Yet, under the Roman law, marriage might be dissolved at the option of both parties.[3] There were two kinds: one called *repudium* and the other *divortium*: but Justinian, in his pandects, enacted that a husband might divorce his wife for specific causes, and so might the wife the husband.[4]

In Rome, divorce (*divortium*), or a right to dissolve the marriage, was by the law of Romulus permitted to the husband but not to the wife, as by the Jewish law; not, however, without a just cause. A groundless or unjust cause

[1] Deut. xxiv. 1-4. [2] Matt. v. 32; Mark x. 4. [3] Bojesen, p. 534. [4] Jus. Pand.

was punished with the loss of effects, of which one-half fell to the wife, and the other was consecrated to Ceres.

A man might divorce his wife if she had violated the conjugal faith, used poison to destroy his offspring, or brought upon him supposititious children, if she had counterfeited his private keys, or even drank wine without his knowledge. In these cases the husband judged, together with his wife's relatives. This law is supposed to have been copied into the twelve tables. Although the law allowed husbands the liberty of divorce, there was no instance of its being exercised for about 520 years. Sp. Carvelius Ruga was the first who divorced his wife, although fond of her, because she had no children, on account of the oath he had been forced to take by the censors, in common with the other citizens, that he would marry to have children.

Afterward divorces became very frequent, not only for important reasons, but often on the most frivolous pretexts. Cæsar, when he divorced Pompeia, the niece of Sulla, because Claudius had got admission to his house in the garb of a music girl, at the celebration of the sacred rites of the Bona Dea, declared that he did not believe anything that was said against her, but that he could not live with a wife who had once been suspected.

If a wife was guilty of infidelity, she forfeited her dowry, but if the divorce was made without any fault of her's the dowry was restored to her. When the separation was voluntary on both sides, she sometimes also retained the nuptial presents of her husband.

In the latter ages of the Republic the same liberty of divorce was exercised by the women as by the men. Some think that right was granted to them by the law of the twelve tables, in imitation of the Athenians. This, however, seems not to have been the case, for it appears they did not enjoy it even in the time of Plautus; only if a man was absent for a certain time, his wife seems to have been at liberty to marry another. Afterward some women deserted

their husbands so frequently and with so little shame that Seneca says they reckoned their years, not from the number of consuls, but of husbands. So Juvenal: and often without any just cause. But a freedwoman, if married to her patron, was not permitted to divorce him.

Augustus is said to have restricted this license of *bona gratia* divorces, as they are called, and likewise Domitian. They still, however, prevailed, though the women who made them, were by no means respectable. A divorce anciently was made with different ceremonies, according to the manner in which the marriage had been celebrated. A marriage contracted by *confarreatio* was dissolved by a sacrifice called *diffarreatio*, which was still in use in the time of Plutarch, when a separation took place betwixt the *flamen* of Jupiter and his wife. A marriage contracted by *coemptio* was dissolved by a kind of release called *remancipatio*. In this manner Cato is supposed to have voluntarily given away his wife Marcia, to Hortensius, and Tiberius Nero his wife Livia, to Augustus, even when big with child.

In later times a divorce was made with fewer ceremonies. In presence of seven witnesses the marriage contract was torn, the keys were taken from the wife, then certain words were pronounced by a freedman, or by the husband himself: "*Res tuas tibi habe vel eto. Tuas res tibi agito. Exi, exi, ocyus. Vade fores, I fores mulier, cede domo.*"

If the husband was absent, he sent his wife a bill of divorce, on which similar words were inscribed. This was called *matrimonii renunciatio*.

If the divorce was made without the fault of the wife her whole portion was restored to her, sometimes all at once, but usually by three different payments.

There was sometimes an action to determine by whose fault the divorce was made. When the divorce was made by the wife, she said: "*Valeas tibi habeas tuas res, reddas meas.*"

Divorces were recorded in the public registers, as marriages, births and funerals.

The Turks have three several kinds. The laws of the Pagans, Mahommedans, Jews, and Greeks admitted of only one kind of divorce. Under the Mosaic dispensation, and during the Jewish economy, this continued to be regarded as a cause pertaining to the civil authority, and, upon the separation, the husband gave the wife a writing to this effect: "I promise that, hereafter, I will lay no claim to thee."

The principle of equality between man and woman appeared under the law of Solon in Athens, Herod in Judea, and Domitian at Rome, by the correlative right of a wife to divorce her husband. The fathers of the Church had great political as well as sacerdotal authority, but weakened their efforts on the subject of divorce by a division of their counsels, St. Augustine opposing, and St. Epiphanius and St. Ambrose allowing it. Pope Nicholas I. forced Lothair I. to take back Teutbergia, his wife, whom he had divorced. The withdrawal of the Eastern Catholics and their constitution of the Greek Church changed the policy of the recusants, who authorized divorce in limited cases: so did the Lutherans after the Reformation. In 1792 a divorce law was enacted in France which allowed of a divorce by mutual consent, and likewise for incompatibility of temper.

Among the Athenians the suit for divorce was conducted very similar to our bills in chancery. The suit was brought before the judge by petition, and, if the wife was petitioner, she was bound to appear in person. The freedom of divorces amongst the Romans, as re-established by the novels of Justinian, continued down to the ninth or tenth century, when the Church assumed a supremacy over it, and for a time abrogated all divorces. The Latin Catholic Church, holding marriage as a sacrament, disallowed divorces altogether, and this continued to be the law of France down to the time of the French revolution. The Greek and the Protestant Churches held it differently, and when those religions prevailed, divorces continued to be allowed. The Code Napoleon allows divorces in cases submitted to the judicial tribunal for num-

erous causes, one of which is the mutual consent of the parties. The laws of most of the provinces of the German Empire allow but two causes of divorce, which are to be ascertained by the judiciary.

EGYPT'S DIVORCE LAWS.

"Divorce laws in Egypt are even worse than those of New York and Sioux Falls, S. D.," said J. N. Farnmore, of London, Eng. "A wife may be divorced twice and return to her husband in Egypt, but if he divorced her a third time and, with a triple divorce declared, send her away, he cannot live with her again until she has been one month married to another man. After the third divorce the husband must pay the part of the dower which was set aside for the wife before marriage, and he must support her out of his house during the three months in which she may not marry again. If the wife be separated from the man and not divorced, she receives a weekly allowance from him.

"A divorced woman may, after divorce, retain her son, under two years of age, and custom gives the child to its mother until it is seven years old; then the father must claim his son. When a man forfeits an engagement to marry he must pay the woman half her dower, and she is free to marry at once. When a wife is disobedient, her husband may beat her; if she still persists in disobedience he may take her, with two witnesses, not his relatives, to the court, and declare against her, and if she does not promise to be obedient thereafter he is not compelled to feed, lodge, or clothe her, but need not divorce her. If she promises obedience then he must at once divorce her or take her home. If the women of the same harem, or of different ones, quarrel, and are complained of to the court, their husbands are punished by the court; but it is certain that the punishment inflicted on the husbands does not save the poor women from chastisement. The lord of the harem has his turn afterward. The husband divorces the wife, but the wife cannot divorce the husband."

In England, parliament granted divorces *a vinculo* occasionally, and the ecclesiastical court had cognizances of divorces *a mensa et thoro*. In 1858 an act of parliament

was enacted, providing a "court for divorce and matrimonial causes," which transferred the entire jurisdiction to the judiciary, and made this sweeping enactment: "No decree shall hereafter be made for a divorce *a mensa et thoro*, but in all cases in which a decree for divorce *a mensa et thoro* might now be pronounced the court may pronounce a decree for a judicial separation, which shall have the same force and the same consequence as a divorce *a mensa et thoro* now has."

Nor was there any divorce, save for adultery, prior to the divorce act of 1858. So likewise in Scotland prior to the conjugal rights act of 1861.

Within the past few decades there has been a most astonishing increase in the demand for, and allowance of, divorces in all civilized countries, but no greater increase of that practice than there has been in other institutions of progress, as wealth, new mechanical and industrial methods, modes of life, legal conditions, etc.

Moralists quite properly express great solicitude at the elements of danger and disintegrating tendencies of the abnormal increase of divorce, but in every case I have noticed the effect is substituted for the cause, and the axe of reform is attempted to be laid to the innocent *branches* rather than to the guilty *root* of the tree. As well might the legislator attempt to keep scamps out of jail or the penitentiary, without more, as to inhibit the procurement of divorce without more, for as long as there is a pre-existing cause for penitentiary convictions, society must incarcerate them there, or do much worse; and, so long as these authoritative reasons therefor exist in society, divorce will ensue as a supervenient need, else worse evils even than divorce will be the necessary sequel.

I admit an urgent need for reform, but I think the reform should commence at the beginning, and not at the end —at the fountain, and not at one of the rills that flow therefrom.

Nor would I accede to a change in all original causes of divorce, for I consider that some of the fruitful causes of divorce are of positive good, but the *immoral* causes I would join in a crusade against, of course, inasmuch as they should be extirpated on all accounts, as well as by reason of their being germinating beds for divorce. One of the most potent causes of divorce is the enfranchisement of women. In the good old days the monarch, man, was, in legal contemplation, the whole family. The individuality of the wife was totally submerged and swallowed up in that of the husband. If the condition was represented by the two digits, 10, she was the cipher, and he both of them. He was ten and she naught. And this was so even in case of Felicia Hemans, George Eliot and Madame Roland. He absorbed her property, but she did not absorb his. He could "lick" her with "a stick not larger than his thumb," and it would not be assault and battery, but she could not reciprocate. Of course in those good old days a divorce for extreme and repeated cruelty would not lie. It was the custom for all men to get drunk: so a divorce for habitual drunkenness could not lie for that cause, either. A woman can now transact business for herself and own her own earnings. By attrition with the practical world she learns to respect herself and the gauge of her marital rights. Hidden causes for divorce are no longer suppressed in unavailing sobs and wails from broken hearts and crushed affections, but are dragged to the light and exposed, as they should be. Again, the spirit of the age demands that men shall live very much away from their families. The vast army of railway train-men, of commercial travelers, and many classes of wage-workers must spend much time absent from their families. The spirit of the age demands it—the present modes of business demand it. No one, probably, would desire to roll backward the wheels of progress to the methods of primeval days. These things tend to induce immorality. It is inevitable. A wife finds her traveling husband, mayhap one who is absent from her pro-

tection for nine months in the year, or four nights out of the week, eating of the forbidden fruit, or possibly she may do so. Will any casuist decry the right of the innocent party to secure a divorce? In such case, which is very common, all will concur that the cause, the flagitious conduct, is wrong, but that the effect, viz., the supervenient divorce, is right, and that in such case, the cause, and not the effect, should be removed. In the olden time ninety per cent. of the people lived on farmsteads. All had an even, unexcited life. The wife and husband were together all the time, except during the time of necessary labors in the field, and causes for divorce were then reduced to the minimum. But to restore those halcyon moral days means to bring retrogression to our industrial life, to obliterate railways, the telegraph, the power press, the ocean steamer, the steam engine and automatic machinery. Does society wish that? Probably not, but such vehicles of progress have a fruitful supply of causes for divorce hidden in the load.

The throwing open of all avocations to women is a fruitful cause of divorce. So long as girls and women were confined to the sacred precincts of home, they were comparatively safe from any attacks, mental or moral, which were the ultimate causes of divorce, but such knowledge of the world and its affairs as is brought by attrition breeds causes for discontent and even more proximate causes. But no one could wish the restrictions upon women's sphere of labor to be curtailed. And thus it will appear that, not divorce, but the causes underlying divorce, constitute the proper subject of condemnation.

The abnegation of *homes* and the propensity to live in boarding-houses, the tendency of women to idleness, the advent of excellent artificial light and the keeping of late hours in consequence, are all suggestive of artificiality in living which breeds *causes* for divorce, but does not breed divorce itself. What, then, should be destroyed? Not the divorce system, surely, but the causes of divorce. All right-

minded persons will, or ought to, concede that the modern and society dramas, the counterfeit nude shows, Zola's novels, "personals," and nastiness in our public press should be repressed with a strong hand, but no one would concur in suppressing the daily paper or the lightning express train, or the "hello" girl in the telephone office, or the fair typewriter, or the drummer. And thus you see that even agencies which produce causes for divorce must be kept up by the force and behest of society.

During the past twenty years 328,000 divorces have been granted in the courts of the United States, according to the New York Sun. Appalling, isn't it? and might furnish good ground for the pessimistic fears that family perpetuity is in danger, only that while the number of golden weddings almost equals the number of divorces, the number of silver weddings exceeds the divorces considerably.

According to statistics there is no calling or vocation which human beings enter into which shows so small a percentage of total failures as marriage, one per cent. being the ratio.

A little less study of the divorce statistics, and a little more investigation of improper marriages, might lower the record still more.

The first case of divorce which arose in my practice illustrates the subject. A "California" widow applied to me. I ascertained that although her husband had been in the gold *diggings*, and absent for more than two years, yet he regularly sent home the sum of his earnings, and I tried to convince her of the uselessness of her attempt; still, to get rid of her, I filed a bill setting up desertion; when court arrived, I offered the proofs, and asked the judge to hold the case over: and that evening, in our room, I informed him that my client was officiating nominally as housekeeper for a widower, but was probably allied by a closer tie, and that, in my judgment, if she got her coveted divorce, they would inter-marry, otherwise the irregular union would continue. In a few days the judge

decided the case. Said he: "This is one of the inevitable cases of a "California" widow; they come up constantly, although never successful, which shows the pressure in that direction. I now announce a new rule on this circuit :whenever a husband remains absent from his family for two years I will release her on her application, even though he does send her, and she does receive from him, money. I am satisfied that the interests of society demand it, and such shall be the rule hereafter." A mere moralist or theorist would disapprove of this, but the judge who rendered this decision was the ablest common-sense judge I ever knew—it was David Davis, afterward a Supreme Judge and U. S. Senator. He spoke from a large experience, and he could have had no ulterior object in his action; it shows the difference between the bird's-eye view of society, which an abstract theorist takes, from the concrete and practical view. And where there is a legitimate *cause* for divorce or nullity, it should be granted, even though the list is large and growing alarmingly larger. If a husband or wife is unfaithful to his or her marriage vows, the innocent one ought, in mercy and decency, to be released; if a husband beats his wife unmercifully, she should be disenthralled from such a monster ;if a husband, being of ability, allows his wife to suffer for the necessaries of life, she should be suffered to be free from him, and similar suggestions may be made of other causes, and, really, as I view it, it is only by metonymy that any satisfactory reason can be urged against the institution, so far as such meritorious cases are concerned. But the *abuse* of the system *is* indeed reprehensible, as also is the conflict in the laws, and their administration. Because divorce is so common, parties are lax and indifferent about their matrimonial engagements and enterprises, deeming the escape therefrom easy, if needful, and very many instances occur where parties, for a little acerbity of temper or trivial and superficial causes, are divorced in haste, only to repent at leisure. Many instances occur where married persons seek improper divorces, in order to make an alliance, preferable. I

have in my mind several instances in my own practice, where I have procured divorces for females at the behest of a waiting matrimonial alliance in another quarter, as thereafter was disclosed. Law-makers should be sedulous to guard against abuses, without impairing the proper uses of the institution. But after all, can the legislator change the nature of men and women by legislation—that is, and not abridge their proper freedom? Suppose that no divorced person should ever thereafter be allowed to remarry, as suggested by Mr. E. J. Phelps? Would that be salutary? Should dissatisfied persons be held in matrimonial subjection by the terrors of such a law? Would not the licentiousness attendant on such a remedy be worse than matters now are? And if our country was replete with divorced men and women, hopelessly estranged from legitimate sexual contact, would not such condition be more deplorable than to allow them an opportunity for legitimate satisfaction? So, in either event, whether such penalty did or did not deter them, it seems to me to extend, rather than abridge, the evils incident to the marital state, and the sexual problem. To try to cure the divorce fever at the surface, and leave the germ and cause within—to apply a plaster to the surface of a cancer, and leave the cancer beneath—is not good treatment, so neither is the suppression of the blossom of this great moral evil, while not interfering with the stalk and root. Do advocates of divorce reform try to suppress Zola, the younger Dumas, Ouida, and such unsavory literature? I recently have read of an exceptionally nasty thing started on the stage at Boston, and then hawked about the rural districts, to crowded houses, the papers say. One item is reported as the bridal chamber and the bride undressing herself before the audience and the groom. I have noticed no remonstrance to this anywhere. That sort of stuff ought to be suppressed, and not the effort of a husband to get released from a giddy wife, who falls from virtue by reason of the unnatural excitements acquired at witnessing such pieces in a moral city. Do the "divorce" re-

formers hope to stifle the storm by arresting the spray of the billowy waves? They will find that the only way to diminish divorce, and not superinduce worse ills, is to purify society, and its tendencies and practices, and that will also purify the foully contaminated institution of divorce. There are grave ills in the system, and which should be remedied; forty-eight several jurisdictions, all differing as to causes, practice, remedies, and length of residence, must engender moral chaos, and is found to do so. There should be an uniformity—uniformity of causes, of residence, of defences, etc.; that would be a genuine and much needed reform, and many causes of unauthorized and improper divorce would be extirpated. The most constant customers of our divorce courts are actors, actresses, opera singers, etc., who, being on the road for ten months in the year, and usually having "no local habitation" in fact, choose Chicago for a residence, as they lawfully may, inasmuch as all citizens should and are privileged to have a *domicil* somewhere; then when they wish a divorce, it is an eligible locality for that purpose.

People sometimes resort to Chicago by force of habit and by reason of the simplicity of the divorce law and practice thereunder, and the further reasonable probability that they migrate there for legitimate reasons. It is not, however, an "*easy*" jurisdiction; no fraudulent divorce can be granted there, except upon the basis of flat perjury, and all evidence is recorded and preserved. The judges are particular and conscientious, and if a divorce is granted there it must have apparent merits, as suitors find out, currently, to their cost.

I am not in favor of amending the constitution so as to confide the subject of divorce to the federal tribunals, for the several reasons that the federal government has already usurped much more power and authority than ever was originally contemplated, or than is expedient or proper, and those powers should not be further enlarged or augmented; it would make a bad precedent and lead to still further interference with domestic matters. The federal judiciary is

already great and expensive, but would have to be greatly enlarged and augmented if it had the business of divorce now vested in three thousand local tribunals added to the huge burden; and it will never be found expedient to abridge the divorce business or practice. It is an immense institution baneful, but necessary, like government, the legal profession, or the penitentiary.

Some marriages are nullities, without any action of court; in some States they are so declared, but that is unnecessary; they are necessarily void on general principles, as the attempted marriage of a person already married, or of children or one child, under the age of seven, or of two girls (which Miss Mitchell of Memphis designed to accomplish). Yet, even in such plain cases, the aid of a court may be invoked in order to adduce the facts by way of evidence, and have a judicial decree in order to silence any possible question or controversy thereafter. In some States, also, other marriages which are not *ipso facto* void on general principles are made so by statute, as a marriage between whites and blacks, and such marriages may be also adjudged void like the other. A *void* marriage, however, is *no* marriage in legal contemplation, and having no spissitude has, also, no consequences of any kind; neither the parties themselves nor any other person need give any heed to such a marriage; but there are cases where, although a marriage may be *void* under certain conditions, yet a judicial inquiry may be needful to determine if those conditions exist. It is so in impotency, want of sufficient age or understanding, consanguinity, insanity, etc., hence, while such alliances may be called *void*, in point of fact they are only *voidable*. If the result of the inquiry is sufficient the court will decree the marriage to have been void *ab initio*, or, as the law phrase sometimes is, enter a decree of nullity.

A *voidable* marriage is one which is good and valid until declared *void* by a court of competent jurisdiction; such a marriage is good during life, unless the aid of a court is

invoked, and is good till declared void: from that day only the marriage is void, and all consequences of a marriage attach until then. In some States a *void* marriage is declared to be void only from the time it is declared void by the court, as the following: "When either of the parties to a marriage, for want of age or understanding, shall be incapable of assenting thereto, or when the consent of either party shall have been obtained by force or fraud, and there shall have been no subsequent voluntary cohabitation of the parties, the marriage shall be void *from the time its nullity shall be declared* by a court of competent authority." [1] This is monstrous logic, or, rather, no logic at all; and it is doubtful if such statutes will be upheld—it is worse than absurd. A man is insane and incapable of making a contract—the court finds it to be so and decrees that the marriage to which *no* consent could be given by the man, was good and *valid* until a decree was pronounced, and thenceforth it was *void:* all consequences of a valid marriage obtained in this *void* marriage till it was declared so. The absurdity is apparent, and if ever property consequences shall attach to such a law, the law certainly cannot stand. Suppose that, in such a State, a widow was entitled to all the personal property of a man and one-half his reality, as in Illinois, and some "Becky Sharp" should entrap a rich lunatic into marriage, and he should die before a suit and decree—would a court uphold a law to despoil his estate through the medium of a *void* marriage? But there are cases of voidable marriages which are properly good till avoided; no attempt may ever be made to avoid them, if not, they remain good. The canonical disabilities were consanguinity, affinity, and impotence, and were only *voidable* under the canon law. In this country impotence is sometimes basis to avoid and declare null and void a marriage, and sometimes basis for divorce merely, but as a rule in this country, consanguinity has the same effect here as it did

[1] R. S. Wis. Ed. of 1858. Code of Va. of 1860.

under the canon law, while affinity after the death of the wife is generally no cause at all.

A divorce *a vinculo matrimonii* is a rupture and sundering of the contract, *status* or bonds of matrimony, from the date of the decree. Many consequences flow from this judgment, as the disposal of the children, the future support of the wife, the matters of dower, the imposition of disabilities upon the defendant as to a future marriage, the consequences in another jurisdiction, etc. After such a decree, any future cohabitation between the same parties would be adultery; they may, however, and sometimes do, marry again.

A divorce *a mensa et thoro* does not annul the marriage, but decrees that the parties shall live apart, either for a limited time, or indefinitely. The complainant may terminate it without leave of court, by resuming the marital relation, but if the defendant should undertake to interfere with the complainant the court would interfere on application of the complainant, and arrest it, either by injunction or imprisonment. Suits for alimony, or separate maintenance, will lie in some States by express statute, without a suit for divorce. The Illinois statute, which is a sample of all, merely provides that, where a married woman shall live apart from her husband without her fault, the husband may be compelled to support her. Suits for jactitation of marriage might possibly lie. Some years ago an actress named Adah Isaacs Menken averred that she and John C. Heenan, the prize-fighter, were man and wife, which Heenan denied. And later, a girl in Chicago claimed to be married to Adolph Spies, the anarchist, by proxy. To test either of these claims, the proper form of action would have been a suit for jactitation of marriage.

STATUTORY PROVISIONS.

CONCERNING DIVORCE AND NULLITY OF MARRIAGE, AND CAUSES THEREFOR.

Maine.—Where the parties are related by consanguinity or affinity, where one or both of them was insane or an idiot at time of marriage, where either or both had a husband or

wife living, undivorced, or marriage unannulled or a nullity at time of marriage, or when either shall be convicted of felony, the marriage is void *ipso facto*, without suit. A *divorce* may be decreed for adultery, impotence, excessive cruelty, utter desertion for three consecutive years, gross and confirmed habits of intoxication, cruelty and abusive treatment; in favor of the wife where husband is negligent, having means, in providing suitable support for wife and children. Decree *nisi* is rendered, to be confirmed and made absolute in six months, if no reconciliation takes place. The inculpated party cannot marry till the lapse of two years from date of decree. Where parties leave the State and procure a divorce elsewhere for a cause not valid in this State, such decree shall have no validity here. Miscegenation is cause for divorce also.

New Hampshire.—A marriage is *void* between parties connected by consanguinity or affinity, or where either or both had a former husband or wife living. A *divorce* is authorized for impotence, adultery, extreme cruelty, a conviction of felony for one year or more, treatment which injures health, treatment whose tendency is to impair reason, desertion for three years, habitual drunkenness for three years, the joining of any religious sect which denies the validity or correctness of marriage, and a refusal to cohabit for six months, refusal of cohabitation for three years, desertion for three years, wife living out of State of domicil for ten years, husband absent from country for three years. Jurisdiction lies where both parties are domiciled, or where complainant is domiciled and defendant served with process in the State, or where one is domiciled in the State and the other has resided in the State for one year.

Vermont.—Parties connected by consanguinity or affinity, or if either has a husband or wife living when marriage is binding and of force, who married in this State, such marriage shall be void *ipso facto*; when parties are under the age of legal consent, or one or both is an idiot or insane at time of

marriage, or physically incapable of entering into the marriage relation, or where the same was procured by force or fraud, any such marriage is *voidable*, and for marriage under age of legal consent, parent or guardian may sue. A *divorce* may be granted for adultery, conviction of felony for three years, or more; intolerable severity, desertion for three years, absence for seven years, gross neglect by husband.

Massachusetts. — Absolute divorces may be granted for adultery, impotence, excessive cruelty, desertion for three years, gross and continued habits of intoxication, cruel and abusive treatment, five years' sentence to prison, jail or house of correction, neglect of husband, he being able, to provide his family the necessaries of life, refusal to cohabit, continued for five years, when either party has united with religious sect which denies the validity of marriage and continues so for three years, refusing cohabitation during that time. All decrees are *nisi* and cannot be confirmed till lapse of six months. A refusal of society for three years is a cause. Court may grant a decree *a mensa et thoro* for desertion, and when continued for three years may grant decree *a vinculo*. Complainant must have five years' residence, and defendant cannot marry for two years.

Rhode Island. — Absolute *divorce* is authorized for any marriage which by law is either void or voidable, for conviction of any crime by which defendant is civilly dead, or for such absence as creates a presumption that defendant is naturally dead. Impotence, adultery, extreme cruelty, desertion for five years, or a shorter time, at the discretion of court, continued drunkenness, neglect of husband to provide for family, and any "other gross misbehavior or wicked misconduct repugnant to, and in violation of, the marriage contract." And limited divorces may be granted for same causes. Complainant must have resided in the State for one year prior to bring suit.

Connecticut.—Absolute *divorce* may be granted for adultery, fraudulent contract, desertion for three years, seven

years' absence, habitual intemperance, intolerable cruelty, improper life, conviction of infamous crime, impotence, violation of conjugal duty, punishment in State prison. There must be three years' residence, unless cause of offence arose since parties came in State, less than three years.

New York.—If wife was not sixteen years of age at date of marriage she may avoid it, if without consent of father, mother or guardian, when there was no cohabitation nor ratification after she reached the age of sixteen; either may avoid if one or both was under age of consent, or when former husband or wife of either was living and marriage in force at time of marriage, or one party was idiotic or a lunatic, or consent was obtained by force, fraud or duress, or physically incapable of entering into the marriage relation. A *divorce* may by granted for adultery when both resided in State at time offence was committed, or when they were married in the State, or if plaintiff resided here when offence was committed the wife can have a domicil here for purposes of suit, regardless of domicil of husband. Divorce *a mensa et thoro* is allowed for cruelty, such conduct as renders cohabitation unsafe or improper, abandonment, refusal of husband to provide for wife. This divorce may be forever or for a limited time.

New Jersey.—An absolute *divorce* is authorized where either party had husband or wife living, undivorced, or where parties connected by consanguinity or affinity, adultery, desertion for three years, or impotence. The court of chancery has jurisdiction at residence at time of commission of offence, or, if the offence was adultery, if committed here and party resides here at time of filing bill, or if desertion, party must have resided here three years.

Pennsylvania.—A marriage within the prohibited degrees of consanguinity or affinity is void *ipso facto*, and an absolute *divorce* may be had for impotence or incapability of procreation, where another husband or wife is living, adultery, desertion for two years, cruel or barbarous treatment by husband, endangering life, or husband offering such intolerable indigni-

ties as to make his wife's life burdensome; same of wife toward husband; conviction of felony for two years or more; consent acquired by force or fraud. Wife may have limited divorce when husband abandons family, turns wife out of doors, endangers her life by cruel treatment, adultery, or offers her such indignities as to make wife's condition intolerable or her life burdensome.

Delaware.—Absolute *divorce* is authorized for adultery, desertion for three years, habitual drunkenness, impotence, extreme cruelty, conviction of felony; a limited or absolute divorce at discretion of court for a marriage of male under eighteen, or female under sixteen, or wilful neglect of husband to provide for wife for three years. A marriage may be declared null and void within the prohibited degrees, miscegenation, or where either party had a husband or wife living at time of marriage; when citizens resort to another jurisdiction to get divorce, the same is invalid here. Inculpated party prohibited from remarrying again.

Maryland.—Marriage may be declared *null and void* for impotence or for any of the usual causes of nullity. Divorce may be had for adultery, abandonment for three years, carnal conduct of wife before marriage, unknown to the husband. *Divorce a mensa et thoro* may be had for cruelty, excessively vicious conduct, abandonment and desertion. Two years' residence necessary unless cause arose here.

District of Columbia.—Absolute *divorce* may be granted when either party has husband or wife living at time of marriage, natural incapacity, adultery, habitual drunkenness for three years, cruel treatment, endangering life or health, desertion for two years; a *divorce a mensa et thoro* authorized in discretion of court for cruel treatment endangering life or health, or reasonable apprehension of bodily harm. Two years' residence required.

Virginia.—A marriage is *void, ipso facto,* by cause of miscegenation or where either party had husband or wife living at time of marriage, also when male was under fourteen, and

female under twelve, years of age. A marriage is *voidable* when the parties are within prohibited degrees, insane, idiotic or impotent at date of marriage. A *divorce a vinculo matrimonii* may be granted for adultery, natural or incurable impotence, conviction of felony either before or after marriage, or, being indicted for felony, becomes a fugitive from justice for two years—desertion for five years, wife pregnant before marriage by person other than, and without knowledge, of husband, or that she had been a prostitute prior to marriage. A *divorce a mensa et thoro* may be decreed for cruelty, creating reasonable apprehension of bodily harm, abandonment or desertion. One year's residence is required.

West Virginia.—A marriage is *voidable* for miscegenation, when either party has husband or wife living, parties within the prohibited degrees, insanity at marriage, incapacitated from physical causes from entering into the married state, under the ages of consent. A divorce *a vinculo* is authorized for adultery, natural or incurable impotency, conviction of felony either before or after marriage, abandonment or desertion for three years, wife pregnant before marriage, not by or with knowledge of husband, or a prostitute before marriage, "or where, prior to such marriage, the husband, without knowledge of the wife, had been notoriously a licentious person." A *divorce a mensa et thoro* is allowed for cruelty or intolerable treatment creating reasonable apprehension of bodily hurt, being habitual drunkard, abandonment or desertion. A false charge of prostitution made by husband against wife deemed cruelty. Must be resident at time of suit.

North Carolina.—Miscegenation makes marriage *void ipso facto*. *Divorce a vinculo* granted if either party shall separate from the other and live in adultery, wife commit adultery, wife pregnant before marriage, impotence; where husband, being indicted for felony, flees the State. *Divorce a mensa et thoro* authorized for abandonment, either party turning the other out of doors, cruelty or barbarity endangering life, intolerable indignity, habitual drunkenness.

South Carolina.—No divorce ever authorized here except during the existence of the negro legislatures after the war. When the whites got control, they legalized what had been granted, and prohibited it in future.

Georgia.—A *total divorce* is authorized for marriage within the prohibited degrees; for such mental incapacity as barred consent: impotence: force: fraud: menace: duress: pregnancy of wife before marriage not by, and without knowledge of, husband; adultery: desertion for three years: sentence to prison for two years, cruelty for two consecutive years. In the discretion of the jury, a divorce may also be granted for cruel treatment or habitual intoxication. A *partial divorce* is authorized for any cause good in England prior to May 4th, 1784. Residence of two years required for a cause *a vinculo matrimonii*, or one year for a cause *a mensa et thoro*.

Florida.—*Absolute divorce* authorized for a marriage within the prohibited degrees: impotence: adultery: either party having husband or wife living: extreme cruelty, or habitual indulgence of violent and ungovernable temper: habitual intemperance: desertion for one year; in case where husband or wife has obtained divorce elsewhere not binding on complainant, he or she may have divorce. Residence of two years required. No divorce for adultery if there was collusion. Wife may have alimony without divorce for one year's desertion: husband living in adultery for three months: cruel treatment, or any act which is cause of divorce.

Kentucky.—*Absolute divorce* for impotence or such malformation as to prevent sexual intercourse, living apart without cohabitation for five years: sentence for felony: abandonment for one year: living in adultery: felonious concealment of a loathsome disease: consent obtained by force, fraud or duress: refusal of society. *To wife:* for continual drunkenness of husband for one year, habitual indignity for six months, cruel treatment or injury. *To husband:* wife pregnant before marriage, not by and without knowledge of, husband: adul-

tery of wife, or such lewd and lascivious conduct as creates a presumption of adultery: habitual drunkenness for one year. Suit to be brought in county of wife's residence; if she live not in State, then in county of husband's residence. One year residence required. Suit barred in five years after act complained of. Limited divorce may be had for the same or for any other cause, in discretion of court.

Tennessee.—An *absolute divorce* authorized for impotence and incapacity of procreation at time of contract: second marriage in violation of a previous one still subsisting: adultery: desertion for two years: conviction of infamous crime or sentence to penitentiary: attempting life of complainant: refusal of wife to remove to Tennessee with husband and remaining absent for two years: wife pregnant at time of marriage without knowledge or procurement of husband: and habitual drunkenness when contracted after marriage; *a mensa et thoro* for cruel and intolerable treatment by husband, making it unsafe for wife to live with, or cohabit with, him: intolerable indignities by husband to wife: or that husband abandoned wife or turned her out of doors: or, being of ability, neglected or refused to provide for wife. No matter when the cause of action arose. Residence of two years required.

Alabama.—*Absolute divorces* may be granted by the chancery court:

1. When either party is physically and incurably incapacitated from entering into the marriage state.

2. Adultery.

3. For voluntary abandonment from bed and board for two years next preceding the filing of the bill.

4. Imprisonment in the penitentiary of this or any other State, for two years, the sentence being for seven years or longer.

5. For the commission of the crime against nature, whether with mankind or beast, before or after marriage.

6. For becoming addicted, after marriage, to habitual drunkenness.

7. To the wife when the husband has committed actual violence on her person, attended with danger to life and health, or when, from his conduct, there is reasonable apprehension of such violence.

8. To the husband when the wife was pregnant at the time of marriage without his agency or knowledge.

On bill filed for abandonment, three years' residence in this State by the complainant must be alleged and proved. When defendant is a non-resident, complainant must have been a *bona fide* resident of this State for one year next preceding the filing of the bill. Divorce for adultery of wife bars her of dower, and of any distributive share in the personal estate of the husband. A divorce for pregnancy bastardizes the issue. A divorce deprives the husband of all control over the separate estate of the wife.

Mississippi.—An *absolute divorce* is authorized for natural impotence: adultery: imprisonment in penitentiary: desertion for two years: habitual drunkenness: habitual and excessive opium, morphine or other drug habit: habitual cruelty and intolerable treatment: insanity or idiocy: a prior subsisting marriage: pregnancy of wife before marriage without knowledge of, or procurement by, husband: connected by consanguinity or affinity. Chancery court has jurisdiction when both are domiciled in State, or when complainant domiciled there and defendant personally served there, or when one was domiciled, and one or the other had one year's residence in State.

Louisiana.—Marriages are void when free contract lacking, or there is a mistake in the person. *Divorce a mensa et thoro* allowed for adultery: felony: habitual intemperance: excesses: cruel treatment: outrages: public defamation: abandonment: attempt to take life of complainant: fugitive from justice: and *divorces a vinculo matrimonii* will also lie, but a *divorce a mensa et thoro* and one year's lapse without recon-

ciliation must be had first in all cases except adultery and infamous punishment.

Texas.—Natural or incurable impotence at time of marriage renders it null and void, *ipso facto*. *Absolute divorce* authorized for excesses: cruel treatment: or outrage of such nature as to be insupportable. In favor of husband for adultery of wife, or abandonment for three years; in favor of wife for husband's desertion for three years, or living in adultery; in favor of either for conviction of felony, but suit cannot be brought for one year after conviction, nor then, if pardoned. Complainant must reside in county for six months.

Arkansas.—*Absolute divorce* authorized for impotency: willful desertion for one year without reasonable cause: where either party had a husband or wife living at the time of the marriage: where either is convicted of felony or other infamous crimes, habitual drunkenness for one year: such cruel and barbarous treatment or personal indignity as shall render the condition of the applicant intolerable: and adultery subsequent to the marriage. The pleadings are not required to be sworn to, but either party may require answers, under oath, to interrogatories touching any matter of propriety. The plaintiff must allege and prove, in addition to a legal ground of divorce, first, a residence in the State for one year next before suit is brought; second, that the cause of divorce occurred or existed in this State, or, if out of the State, either that it was a legal cause of divorce in the State where it occurred or existed, or that the plaintiff's residence was then in this State; and, third, that the cause of divorce existed or occurred within five years next before the commencement of the suit. The court may allow alimony *ad interim*, and attorney's fees for the wife. On final judgment each party is restored to the undisposed property which he or she brought into the marriage. The court may restore the wife to her maiden name. The court may allow the wife reasonable alimony, which may be changed from time to time. Plaintiff must have had one

year's residence. Cause barred after five years. Limited divorces allowed for same.

Missouri.—*Absolute divorce* allowed here for impotence: prior subsisting marriage: adultery: desertion for one year: conviction of felony: drunkenness for one year: cruel and barbarous treatment, so as to endanger life: intolerable indignities: when husband becomes a vagrant: conviction of infamous crime before marriage: wife pregnant before marriage without aid or knowledge of husband. One year's residence of plaintiff required.

Ohio.—*Absolute divorce* authorized where prior subsisting marriage exists: willful absence three years: adultery: impotence, sentence to penitentiary if sought during imprisonment: a divorce procured out of State which releases defendant and binds complainant: extreme cruelty: fraudulent contract: gross neglect of duty: three years' drunkenness; no limited divorce, but alimony without divorce for adultery, abandonment of wife, separation, habitual drunkenness, sentence to penitentiary. Residence of one year required. Wife may have separate domicil.

Michigan.—Marriages within prohibited degrees of consanguinity or affinity, prior subsisting marriage, when either party was insane or an idiot at time of marriage, if solemnized in State, void, *ipso facto*; also imprisonment for life, same. *Absolute divorce* granted for adultery: physical incompetency: imprisonment for three years: desertion for two years: habitual drunkenness: and when a divorce has been obtained by defendant in another State. Limited (or absolute, in discretion of court) divorce for extreme cruelty: desertion for two years: or failure of husband to support wife.

Indiana.—Marriages within prohibited degrees, or of different colors, or when prior marriage subsisting, are *void ipso facto*; when parties are incapacitated, by age or lack of understanding, they are voidable. *Absolute divorces* are authorized for adultery: impotence: abandonment for two years: cruelty and inhumanity: habitual drunkenness: failure of husband

to support wife for two years: conviction of infamous crime; no decree for adultery if connivance or condonation took place. Prosecuting attorney to defend unless defendant himself should defend. No limited divorce, but wife may have alimony without divorce for desertion: conviction of felony: habitual drunkenness: and failure to support: or joining sect which denies validity of marriage.

Illinois.—*Absolute divorce* authorized for impotence: former marriage subsisting: adultery: desertion for two years: habitual drunkenness for two years: attempting life of defendant: extreme and repeated cruelty: conviction of a felony. Residence of one year required, unless cause arose here.

Wisconsin.—Marriages within the prohibited degrees void *ipso facto:* same if a prior subsisting marriage exists; if parties from lack of age or understanding have not a contracting capacity, force or fraud used, the same is voidable; sentence for imprisonment for life makes it void, *ipso facto.* An *absolute divorce* authorized for adultery: impotence: imprisonment for three years: desertion for one year: cruel and inhuman treatment: or wife a drunkard: drunkenness of either for one year: or separation five years. *Divorce a mensa et thoro* for desertion drunkenness: or cruelty: extreme cruelty: neglect of husband to provide for family: or conduct rendering cohabitation unsafe. Residence one year, unless cause arose here.

Iowa.—*An absolute divorce* will lie for adultery: desertion for two years: conviction of felony: habitual drunkard: intolerable treatment calculated to end life of wife complainant: pregnancy of wife before marriage: without co-operation or knowledge of husband: courts will annul illegal marriages, prior marriage subsisting, insanity or idiocy at marriage, or impotence. Must have residence in county for one year.

Minnesota.—A marriage within the prescribed degrees is void *ipso facto* if solemnized within the State. If husband or wife is absent for five years, marriage void from date of decree; a marriage of persons not of proper age or understanding, or when consent was gained by force or fraud, is

voidable. An absolute divorce is authorized for adultery: impotence: cruel and inhuman treatment: conviction of felony: wilful desertion for three years: habitual drunkenness for one year. Limited divorce to wife for cruelty: conduct rendering intercourse unsafe: abandonment: and refusal of support. Connivance, condonation or recrimination are bars, and one year's residence required.

Kansas.—A marriage is void when parties lack age or understanding. An absolute divorce lies in case of prior subsisting marriage, abandonment for one year: adultery: impotence: pregnancy of wife before marriage: extreme cruelty: fraudulent contract: habitual drunkenness: gross neglect of duty of husband or wife: conviction of felony. Wife may have alimony without decree for any of the above causes, at her discretion. One year's residence is required. Wife may have separate domicil.

Nebraska.—A marriage contracted by parties under legal age is voidable. *An absolute divorce* will lie for adultery: physical incompetency: imprisonment for three years: desertion for two years: habitual drunkenness: improper life: extreme cruelty: desertion for two years: wilful or gross neglect of husband to provide. Six months' residence is required.

Colorado. — *Absolute divorce* authorized for impotence: prior subsisting marriage: adultery: desertion for one year: desertion from State with no intention of returning: husband failing to support wife for one year: habitual drunkenness for one year: extreme cruelty: conviction of felony: legitimacy of children not affected, except for prior marriage. One year's residence required unless offence occurred in this State, or while one or both parties resided here; no decree where collusion occurred.

Dakotas.—*Absolute divorce* authorized for adultery: extreme cruelty: wilful desertion: wilful negligence: habitual intemperance: conviction of a felony:

Section 2,561. — Extreme cruelty is the infliction of

grievous bodily injury or grievous mental suffering upon the other, by one party to the marriage.

Section 2,562.—Wilful desertion is the voluntary separation of one of the married parties from the other, with intent to desert.

1.—The refusal of either party to dwell in the same house with the other party, when there is no just cause for such refusal, is desertion.

2.—When one party is induced by the stratagem or fraud of the other party to leave the family dwelling place or to be absent, and during such absence, the offending party departs with intent to desert the other, it is desertion by the party committing the stratagem or fraud, and not by the other.

3.—Departure or absence of one party from the family dwelling place, caused by cruelty or by threats of bodily harm from which danger would be reasonably apprehended from the other, is not desertion by the absent party, but is desertion by the other party.

Section 2,563.—Wilful neglect is the neglect of the husband to provide for his wife the common necessaries of life, he having ability to do so, or it is the failure to do so by reason of idleness, profligacy, or dissipation.

Section 2,564.—Habitual intemperance is that degree of intemperance from the use of intoxicating drinks which disqualifies the person a great portion of the time from properly attending to business, or which would reasonably inflict a course of great mental anguish upon the innocent party.

Section 2,565.—Wilful desertion, wilful neglect or habitual intemperance must continue for one year before either is a ground for divorce.

Decree denied on proof of connivance, condonation, collusion, recrimination. Guilty party cannot marry. Wife may acquire separate domicil; ninety days' residence required.

New Mexico authorizes *absolute divorce* for adultery, abandonment, cruelty, or inhuman treatment.

Arizona.—Absolute divorce authorized for impotence: extreme cruelty or outrageous treatment: for adultery of wife: desertion for six months: habitual intemperance: wilful neglect for six months: adultery: conviction of felony: but no

suit till six months after conviction. Residence required, six months.

Idaho.—Nullity of marriage authorized when age of consent not reached and no permission obtained: or prior subsisting marriage: or party of unsound mind: consent obtained by force or fraud: or party physically incurable. An *absolute divorce* authorized for adultery: extreme cruelty: wilful desertion: wilful negligence: habitual intemperance for one year: conviction of felony. Decree denied on proof of connivance, condonation, collusion, or recrimination. Six months' residence required.

California.—Incestuous or void marriage may be so declared. Marriage annulled for want of age of legal consent without parental permission: prior subsisting marriage; party of unsound mind: consent obtained by fraud or force: physical incapacity. An *absolute divorce* may be granted for adultery: extreme cruelty: desertion: neglect of husband to provide: habitual intemperance: conviction of felony. Condonation, connivance, collusion and recrimination, prevail as defenses. Limitation of two years in adultery. Husband and wife may have separate domicil. Six months' residence required.

Nevada.—Absolute divorce lies for impotence: adultery: desertion one year: conviction of felony: habitual gross drunkenness committed since marriage: incapacitated from support: extreme cruelty: neglect of husband to support family one year; may be annulled for force, menace or duress. Jurisdiction where cause accrued or defendant resides or is found, or plaintiff resides, if in county of last cohabitation, or residence six months.

Montana.—Absolute divorce authorized for impotency: prior marriage subsisting: adultery: desertion for one year: or if husband has left State without intention to return, habitual drunkenness for one year: extreme cruelty: conviction of felony. One year's residence required, unless offense occurred here, or while one or both parties resided here.

Utah.—*Absolute divorce* lies for impotence: adultery: desertion for one year, wilful neglect of husband to provide, habitual drunkenness; conviction of felony: cruel treatment involving great bodily or mental anguish. One year residence required.

Washington.—*Absolute divorce* authorized for force or fraud in getting married: adultery: impotence: abandonment for one year: cruel treatment or personal indignity rendering life burdensome: habitual drunkenness: neglect of husband to provide: conviction of felony: chronic mania or dementia for ten years: "for any other cause deemed by court sufficient and the court satisfied that the parties can no longer live together." Residence required of one year.

Wyoming.—Marriage *void ipso facto* where prior subsisting marriage exists, or parties were insane or idiotic, or within prohibited degrees. Marriage *voidable* if celebrated while parties were under legal consent, or by force or fraud. *Absolute divorce* for adultery: physical incompetency; conviction of felony: desertion for one year: habitual drunkenness: extreme cruelty: husband's neglect to provide for one year: intolerable indignities: husband a vagrant: conviction of felony prior to marriage: pregnancy of wife before marriage. Six months' residence required.

Oregon.—Marriages are *void ipso facto* when within prohibited degrees, or prior subsisting marriage exists, or one of the parties is white and the other one-quarter or more negro blood. *Voidable* for want of age or understanding, or use of force or fraud. *Absolute divorce* for impotence: adultery: conviction of felony: drunkenness or desertion for one year: cruel and inhuman treatment, rendering life unendurable. One year residence.

A GENERAL SUMMARY OF THE ABOVE.

There are no limited divorces in the following States and territories, viz.: Arkansas, Colorado, Connecticut, Florida, Indiana, Illinois, Idaho, Iowa, Kansas, Massachusetts, Mis-

sissippi, Montana, Nevada, New Hampshire, New Mexico, Vermont, Washington—no proceeding but nullity of marriage and *a vinculo matrimonii*. *Adultery* is a good cause for divorce everywhere. *Natural impotence* is a good cause for nullity of marriage or divorce, everywhere. *Bigamy* is cause of nullity of marriage everywhere, except in Arkansas, Colorado, Florida, Kansas, Ohio, Pennsylvania, Tennessee, Montana, New Jersey; and in those States it is cause for divorce. In Arizona, Arkansas, California, Colorado, Dakota, Florida, Idaho, Kansas, Kentucky, Missouri, Montana, Nevada, Utah, Washington and Wisconsin, divorces are decreed for abandonment for one year. In Alabama, Illinois, Indiana, Iowa, Michigan, Mississippi, Nebraska, Pennsylvania and Tennessee, divorces are authorized for two years' abandonment. In Connecticut, Delaware, District of Columbia, Georgia, Maine, Maryland, Massachusetts, Minnesota, New Jersey, Ohio, Oregon, Texas, Vermont and West Virginia, divorces are authorized for desertion for three years. In Rhode Island and Virginia, five years' desertion is required; and in Louisiana and North Carolina, abandonment is a good cause, but the period is left indefinite; simple unexplained absence is a good cause for divorce after seven years; after three years in New Hampshire; if husband has left state in Montana with no intention to return; simple separation after five years in Kentucky and Wisconsin. Cruel and inhuman treatment is good everywhere. Attempt to take life of defendant, good in Illinois, Louisiana and Tennessee. Habitual drunkenness is good everywhere, generally with no limit, but two years in Idaho, Illinois and Ohio; one year in Arkansas, California, Colorado, Dakota, Florida, Kentucky, Minnesota, Missouri, Montana, and Wisconsin, and three years in New Hampshire and Ohio.

Neglect of husband, he being of ability, *to provide for his family*, is good cause in several States, and limited to three years in Delaware, two years in Idaho, Indiana and Kansas, and one year in California, Colorado, Dakota, Nevada: and no limit in Massachusetts, Michigan, Minnesota, Nebraska,

Rhode Island, Utah, Vermont, Virginia, West Virginia and Wisconsin. *Imprisonment for crime* is good in some States, but limited to sentences of five years in Massachusetts, three years in Michigan, Nebraska, Vermont and Wisconsin, two years in Alabama, Georgia, Idaho; more than two in Pennsylvania; no limit in Minnesota, Mississippi, Ohio, Virginia and Washington. *Conviction of felony* is cause in Arizona, Arkansas, California, Colorado, Connecticut, Dakota, Delaware, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Missouri, Nevada, Oregon, Tennessee, Texas (twelve months after sentence), Utah, Virginia, West Virginia, Montana; in Rhode Island for any crime causing civil death, arson and homicide. *Pregnancy of wife* at time of marriage is cause in Alabama, Georgia, Kansas, Kentucky, Missouri, North Carolina, Tennessee, Virginia and West Virginia, and in Iowa, also, unless the husband had an illegitimate child living at time of marriage. *Marriage within* degrees of consanguinity is invalid without more, except in Florida, Georgia, Mississippi, Pennsylvania, Virginia and New Jersey: and in such States it is cause for divorce. *Marrying female under age* of legal consent, without consent of parents or guardian, is ground for divorce in Arizona, Delaware and Idaho; invalid in most other States, unless confirmed when age of legal consent is attained. *Force or fraud* employed in obtaining consent, ground for divorce in Arizona, Connecticut, Delaware, Georgia, Idaho, Kansas, Kentucky, Ohio, Pennsylvania, Washington; void in other States. *Lunacy or idiocy*, good cause for divorce by statute in the District of Columbia, Georgia, Mississippi, Virginia and Wisconsin; it is ground of nullity on general principles everywhere else. *Vagrancy* is a statutory cause for divorce in Missouri. "*Any cause which renders cohabitation impossible*" is ground for divorce in Washington. *Uniting with any society which discountenances the marriage relation* is good ground in Kentucky, Massachusetts, New Hampshire. *Gross misbehavior* is good cause in Rhode Island.

The having a loathsome disease is good cause in Kentucky for divorce.

Long continued absences afford ground for divorce in most of the States, ranging from two to seven years. In Louisiana a second marriage is good after an absence of the first husband for ten years; similarly in Arkansas after an absence of five years. In California, Idaho and Minnesota, such second marriage is good, and the children thereof legitimate, till annulled.

CLASSIFICATION OF CAUSES FOR DIVORCE.

Adultery.—Is a cause everywhere.

Cruelty and inhuman treatment.—Everywhere except New York, New Jersey, Virginia, West Virginia, Maryland and North Carolina; in Alabama, Kentucky and Tennessee, divorce lies only to the wife for this cause.

Impotence, physical incapacity, etc., at time of marriage.—Everywhere except New York, Connecticut, Vermont, Iowa, Arizona, Dakota, Idaho, California, Louisiana, Texas and New Mexico.

Desertion, abandonment and willful absence.—All except New York and North Carolina.

Habitual drunkenness.—Everywhere except New York, Pennsylvania, New Jersey, Maryland, Virginia, West Virginia, Texas, North Carolina and Vermont; when wife is given to intoxication, Wisconsin.

Conviction of felony.—Everywhere except New York, New Jersey, Maine, Maryland, District of Columbia, Florida, New Mexico, North Carolina. Where husband is indicted for felony and flees the State: Virginia, North Carolina and Louisiana.

Where either party had former husband or wife living.—Pennsylvania, New Jersey, Ohio, Tennessee, Illinois, Missouri, Kansas, Mississippi, Montana, Colorado, Arkansas, District of Columbia, Florida.

Disappearance.—Connecticut, New Hampshire, Rhode Island, Vermont.

Procurement of marriage by force, fraud or duress.—Pennsylvania, Ohio, Connecticut, Washington, Georgia, Kentucky, Kansas.

When husband is a vagrant.—Missouri, Wyoming.

Attempt by either party on the life of the other.—Illinois, Louisiana and Tennessee.

Illicit carnal intercourse of wife before marriage.—Maryland.

Gross neglect of duty.—Ohio and Kansas.

Marriage under age of legal consent.—Delaware.

Insanity, occurring subsequent to marriage.—Arkansas.

Joining religious sect believing marriage unlawful.—Kentucky, Massachusetts, New Hampshire.

Insanity or mental incapacity at time of marriage.—Georgia, Mississippi, District of Columbia.

Marriage within prohibited degrees.—Pennsylvania, New Jersey, Georgia, Florida, Mississippi.

Public defamation.—Louisiana.

Any cause rendering the marriage originally void.—Maryland, Rhode Island.

Living apart.—Kentucky, Wisconsin.

Incurable chronic mania, or dementia for ten years.—Washington.

Where one of the parties has obtained divorce elsewhere.—Florida, Ohio and Michigan.

Husband notoriously licentious before marriage.—West Virginia.

Failure or neglect of husband to provide for wife.—Rhode Island, Maine, Massachusetts, Arizona, Wisconsin, New Hampshire, Wyoming, Utah, California, Dakota, Colorado, Delaware, Idaho, Nebraska, Indiana, Michigan, Tennessee, Washington, Nevada, New Mexico, Vermont.

Wife a prostitute before marriage.—Virginia, West Virginia.

Habitual indulgence in violent and ungovernable temper.—Florida.

Intolerable indignities.—Pennsylvania, Tennessee, Oregon, Arkansas, Missouri, Wyoming, Washington.

Conduct rendering it unsafe or improper to cohabit with husband.—Tennessee.

Refusal of wife to removal to husband's State.—Tennessee.

Concealment of loathsome disease at marriage.—Kentucky.

When either party become impotent since marriage, from excesses.—Colorado.

Crime against nature.—Alabama.

Lewd and lascivious conduct of wife.—Kentucky.

Pregnancy of wife before marriage.–Virginia, West Virginia, Georgia, Alabama, Iowa, Kansas, Missouri, Kentucky, Mississippi, North Carolina, Tennessee, Wyoming.

Gross misbehavior in violation of marriage covenant.—Rhode Island.

Where husband shall turn wife out of doors.—Tennessee.

Any other cause deemed by the court sufficient, and when parties can't live together.—Washington.

SUMMARY OF CAUSES FOR LIMITED DIVORCE.

Adultery.—Rhode Island, Pennsylvania, Kentucky, Alabama, Louisiana and Arkansas.

Lewd and lascivious behavior of wife.—Kentucky.

Pregnancy of wife at marriage, unknown to husband.—Kentucky and Alabama.

Procurement of marriage by force, duress or fraud.—Kentucky.

Gross misbehavior and wickedness in violation of marriage contract.—Rhode Island.

Abandon, desertion, wilful absence.—New York, Wisconsin, North Carolina, Virginia, West Virginia, Pennsylvania, Tennessee, Rhode Island, Alabama, Arkansas, Nebraska, Maryland, Kentucky, Michigan, Louisiana, Minnesota.

Impotency, physical incapacity existing at marriage.—Rhode Island, Kentucky, Alabama, Arkansas.

Attempt by one party upon life of other.—Louisiana.

Concealment of loathsome disease existing at marriage.—Kentucky.

Contracting loathsome disease after marriage.—Kentucky.

When either party had a former husband or wife living.—Arkansas.

Procurement of marriage when either party was under age of consent.—Delaware.

Any cause rendering marriage originally void or voidable.—Rhode Island.

When either party has joined religious sect during marriage.—Kentucky.

Cruelty, inhuman treatment, actual violence or apprehension thereof.—Tennessee, Wisconsin, Virginia, West Virginia, New York, Rhode Island, New Jersey, North Carolina, Nebraska, Pennsylvania, Louisiana, Minnesota, Kentucky, Alabama, Maryland, District of Columbia, Michigan, Arkansas, Georgia.

Indignities rendering condition intolerable or life insupportable.—Pennsylvania, North Carolina, Tennessee and Arkansas.

Conduct rendering it unsafe or improper for parties to cohabit.—New York, Minnesota, Wisconsin and Tennessee.

Conviction of felony or infamous crime: imprisonment.—Rhode Island, Kentucky, Arkansas, Louisiana.

Insanity occurring after marriage.—Arkansas.

When either party *has fled from justice.*—Louisiana.

Failure or neglect of husband to provide for wife.—Rhode Island, New York, Delaware, Tennessee, Nebraska, Wisconsin, Michigan, Minnesota.

Drunkenness.—Georgia, Alabama, Louisiana, Kentucky, North Carolina, Arkansas, West Virginia, Wisconsin, Rhode Island.

Where one party shall turn the other out of doors.—Pennsylvania, Tennessee and North Carolina.

Any ground which was held sufficient in the English courts prior to May 4th, 1784.—Georgia.

Such other cause as the court may deem sufficient.—Kentucky.

Such other cause as may seem to require divorce.—Rhode Island.

Disappearance (absence, creating presumption of death).—Rhode Island.

Living apart (voluntary separation).—Kentucky.

Public defamation.—Louisiana.

Excessively vicious conduct.—Maryland.

Crime against nature.—Alabama.

When the wife shall be given to intoxication.—Wisconsin.

The age of legal consent has been radically changed in many of the States by express legislation. In New Mexico, if the male is under 21, or the female under 18, and no consent obtained, the marriage is void *ipso facto*. In Iowa, North Carolina and Texas the age of legal consent is 16 for a male, and 14 for a female. In Alabama, Arkansas, Georgia and Illinois the age of consent is 17 for a male, and 14 for a female. In California, Minnesota, Oregon and Wisconsin, 18 for a male, and 15 for a female. In New York, Deleware, Michigan, Nevada, Nebraska and Ohio, 18 for a male, and 16 for a female.

Abduction of a female with a view to an enforced marriage, is a grave crime everywhere.

In Arkansas, where it is least to be expected, they have taken advanced (and the proper) stand on the subject of crimes against the female sex, by making the punishment for rape, *death*, and by also making this enactment: "Every person who shall take unlawfully and against her will any woman, and by force, duress or menace compel her to marry him or to marry any other person, or to be defiled, shall suffer death."

THE DOCTRINE OF ABSENCE.

As has been shown, a wilful absence of a party from his or her family for a certain period, varying in different States, is a valid cause of divorce, and if properly obtained in the

place of the genuine and permanent, and not temporary and fraudulent, domicil, and legal notice given or due publication made, such divorce will be valid, and the plaintiff can remarry at any time after the procurement of such decree, and this cause, on the whole, is the most prolific source of divorce in its practical realization. The terms "wilful," "malicious," or "with intent to desert" or "abandon," are often used in express terms, and are always implied. Under those statutes no extent of time is sufficient to constitute legal abandonment or desertion, unless the intention to abandon exists. A man might go on an extended tour and be gone beyond the time, but it would not be technical desertion of itself, and if an attempt should be made to secure a divorce by virtue of such absence, the court must be satisfied by actual or presumptive proof that the absence was wilful, malicious, or designed to be permanent. In some States a certain term of *unexplained* absence is good ground for divorce. In New Hampshire, if the wife lives out of the State for ten years, a divorce may be decreed; so if the husband is absent from the State for three years; and, in addition, wilful absence is provided for. In Vermont, absence for seven years is good cause. In Rhode Island divorce is authorized for such absence as creates a presumption of death (seven years). In Connecticut, divorce allowed for seven years' absence. In Louisiana, ten years' absence without any tidings of absentee, authorizes absolute divorce. In Colorado, absence from State, with no intention of returning, good cause for divorce. In Washington a divorce is authorized for any cause deemed by the court to be sufficient, etc., and which would include a long absence. If a party leaves his family and remains absent for a sufficient time to justify a decree for desertion, the remaining party can usually array presumptive proof that it is so, and obtain a divorce; but it sometimes occurs that a wife does not wish to formally obtain a divorce, but does wish to marry again; *i.e.*, she believes her first husband to be dead, but cherishes his memory too fondly to ask for a divorce. In such cases, she

must take her chances, but the law relieves her from the penalties, as bigamy, adultery, etc., if she waits a certain length of time and then remarries, not having heard from the missing husband meanwhile. In Pennsylvaina this term is two years if the death of the former husband is declared "upon false rumor, in appearance well founded," and if the former husband returns and finds his wife again married, he may obtain a divorce, or resume relations with his wife, and annul the second marriage. In New Hampshire, if the husband is beyond the seas, or in any of the United States, unheard of, or if the first marriage was made while under age of legal consent, the time is three years. In Iowa the time is three years if the absent party is beyond the sea, or if the plaintiff has good reason to believe the absent one to be dead. In Arkansas, if the absent party is absent from the United States for five years, or if the absent party lives out of the State, without being known to be alive, for five years, a subsequent marriage without divorce is good. In California and Idaho, if the absent party was generally reputed and believed to be dead, five years' absence is sufficient. In the Dakotas, if the absent party is continually absent from the United States for five years, or if the absent one was generally reputed and supposed to be dead, or if the absent one has been sentenced to imprisonment for life, five years is sufficient. In Delaware, five years is sufficient if the party absent is, with good reason, believed to be dead. In Florida, if the absent one is beyond the seas for five years, it is sufficient. In Georgia, five years is sufficient, if no information has been received as to the fate of the absentee. In Iowa, if the absent one continually remains beyond the sea, or the citizen or remaining one has good reason to believe the absent one to be dead, three years' absence is sufficient. In Michigan and Washington it is the same, but five years is required. In Kansas, five years is sufficient, if the missing party is continually absent from the United States, or if the former spouse has been sentenced to imprisonment and hard labor

for life, or if the former marriage was contracted while under the age of consent. In Kentucky, five years is sufficient, if the former marriage was contracted while under the age of consent, or if the absent party continually remained beyond the sea, or in the United States, unheard of. In Minnesota, if the remaining party believes the absent party to be dead, five years' absence suffices. In Mississippi, five years' absence suffices, if the absent party is continually beyond the United States. In Nebraska, five years' absence is sufficient, if the absence was wilful and continuous. In New Jersey, five years' absence is sufficient, if the missing party is continuously absent from the United States, or if the former marriage was contracted while under the age of consent. In New York, five years' absence is sufficient, if the absent party is continuously absent, or if the former spouse was sentenced to imprisonment for life. In Tennessee, if the absent party has been absent five years, and not known to the other to be living, or if the remaining party has good reason to believe the missing party to be dead for five years, or if the absent party continuously remains beyond the United States for five years, it is sufficient, but if the absent one returns he may either resume the married state or get a divorce, at his election. In Texas, five years' absence, unheard of, or five years remaining out of the State, is sufficient. In Alabama, Arizona, Colorado, Illinois, Montana, Nevada, New Mexico, Ohio, Utah, and Wyoming, five years' absence, unheard of, will justify the remaining spouse to remarry, subject, of course, to the contingency of its being null if the first husband should return.

In Massachusetts, if no information has been received of the fate of the absentee, seven years' absence is sufficient. In Missouri, if the former marriage was contracted while under the age of consent, or if the absent party was continually absent from the United States for seven years, or if the former spouse has been sentenced to imprisonment for life, seven years' absence is sufficient. In Rhode Island, if the

former marriage was contracted while under the legal age of consent, or if the absent party is beyond the limits of the State, seven years' absence is sufficient. In South Carolina, after the seven years' absence of one spouse, or that he or she has been sentenced to imprisonment for life, or the former marriage was contracted while under the age of legal consent, or if the missing party was absent from the United States for seven years, it is sufficient, and a subsequent marriage contracted is valid. In Vermont, seven years' absence unheard of, or the missing party remaining beyond seas or beyond the limits of the State for seven years, or if the former marriage was contracted while under the age of consent and not afterward ratified, the seven years' absence will suffice. In Wisconsin, seven years' absence unheard of, or if absent party is continually beyond the sea for that period, it will suffice; and in Maine, North Carolina, Oregon, Virginia, and West Virginia, seven years' absence, unheard of, or not known to be living is, sufficient, without qualifications of any kind.

The above are cumulative, and are not designed to abridge, alter or impair any other provisions. Except as qualified, the absence must be coupled with the fact of no information meanwhile of the absent party; and also with the contingency of the missing one returning to claim his marital rights. In some States, as I have shown, the subsequent marriage invalidates the prior one *ipso facto*; in two States, it is optional with the returning spouse to dissolve or restore it. In Louisiana it is discretionary with the court to validate the second marriage. But unless otherwise qualified or provided, the first husband has all the responsibilities and benefits of wedlock; he may not marry again under the penalty of bigamy; he will be liable as ever for the support of his wife, and for such children of the second marriage as need a mother's care. He could require his wife to come and live with him, and, if she refused, it would be desertion; she could demand a home at his hands and the law would visit

him with the penalty of failure to support, should he refuse, or desertion, according to the local law. As a rule, the children of the second marriage would not be illegitimate, but would be the legitimate children of the wife and the second husband. This is, however, by force of statute, which usually provide that such children are legitimate, if begotten while the mother deemed her first husband to be dead. Such children would be heirs to the second husband and the wife, but not to the first husband. Of course, after resumption of the marriage relation by the rightful husband, the second husband has no further interest in the wife, and should he embrace her sexually, it would be adultery in them both. The first husband might be under obligation to provide for the children of the second marriage while they were of tender years, if the second husband was not able to do it, but he could exclude them after they became old enough to maintain themselves. The mother would not be justified in turning them out to starve, and her husband must maintain, not only her, but those whom the law compelled her to support. She would have no further right in the second husband or his property —would have no alimony or dower—and, if the first husband should die, a new marriage would be necessary before she and the second husband could live together again.

As I have said, if the above requisitions were complied with, the wife would not be guilty of bigamy, not even if she continued to live with the second husband after the return of the first, unless after such return she remarried her second husband, but her continuance of cohabitation with the second would be a living in adultery together. The second husband would need no divorce on the return of the first, as his return and resumption of the married relation would annul his marriage *ipso facto*. If, however, the first husband should, in the two States where he was allowed to, elect to secure a divorce, the second marriage would be valid without a new ceremony.

The first husband could not punish his wife in any

way for adultery, nor make it a cause of divorce, by reason of her alliance with the second husband, but if the connection continued, both might be prosecuted for adultery, and the first husband, if he did not connive at it, could also maintain a civil suit for damage.

There are more cases of this kind than the world knows of. It is not altogether rare for men to abandon their wives, and after a long absence, return; and I have known of singular complications to arise. The law-makers, however, have seemed to make all the provisions needful to meet such cases, but the melodramas of such situations cannot be shorn of their heart-rending or bitter phases, by law. The allowing of the absent one to resume or withdraw at his election seems unjust. As he or she was originally to blame, the constant and remaining one should have the election, if either.

ADULTERY.

Adultery is the voluntary sexual intercourse of a married person with a person other than the offender's husband or wife: or, it is "sexual connection between a married woman and an unmarried man, or a married man other than her own husband;" or, "unlawful, voluntary sexual intercourse between two persons, one of whom, at least, is married," is the essence of the crime, in all cases. In general, it is sufficient if either party is married, and the crime of the married party will be *adultery*, while that of the unmarried party will be *fornication*. "By the civil law, adultery could only be committed by the unlawful sexual intercourse of a man with a married woman. Thus, as stated in Wood's Institute, 272, adultery is a carnal knowledge of another man's wife, and the connection of a married man with a single woman, does not make him guilty of the crime of *adultery*."[1]

"Strictly, *adultery* consists in carnal connection with another man's wife. Such an act is *adultery* and not *fornication* (2 Blackf., 318), and the sexual intercourse of any man

[1] 6 Metc., 243. 36 Me., 261. 11 Ga., 56. 56 Ind., 271. 35 Me., 205. 27 Ala., N. S., 23. 5 Jones N. C., 416. 1 Yeates, 6. 2 Dall., 124. 7 Gratt., 591. 21 Pick. 509.

with a married woman is adultery in both, and the intercourse of a married man with an unmarried woman is fornication in both. There never was an action for adultery known to be maintained at the common law by any but the husband, showing that the offense cannot possibly be committed with any other than a married woman. The heiniousness of it consists in exposing an innocent husband to maintain another man's children, and having them succeed to his inheritance. This is the common law doctrine of adultery. * *[1] But in this country no such distinction is made by the statutes between adultery by the husband, and adultery by the wife.[2] This is the most prolific cause for divorce. It was and is a canonical cause, and is the only cause authorized for moral delinquency in severe jurisdictions. It is the universally accepted unpardonable marital sin. Its definition, as applied in American courts, is the voluntary indulgence by a married person of the sexual act with a person of the opposite sex, other than the husband or wife of the offender. It is, therefore, not adultery when the act is enforced, as by a rape, when the subject is drugged into unconsciousness, or when a person is mistaken in a person, supposing the co-operating party to be the lawful partner, which might happen in the dark; nor is the crime of sodomy, legal adultery, inasmuch as such act of commerce was not with a person of the opposite sex, as a rule.

As this is a serious marital crime, presumptions of guilt will not lie except upon substantial proof by circumstances. The presumption of innocence requires strong circumstances to overcome. All married persons are under an oath of continence, and while there may be many innocent acts of flirtation and license, it would be uncharitable and misleading to infer guilt therefrom; and courts are very cautious and particular to make no mistake in that particular. Yet this crime is rarely proven otherwise; offending parties exclude witnesses, as an almost inevitable rule. The visits of a

[1] 56 Ind., 272. 1 Harrison, 380. [2] Rapalje & Lawrence Law Dict.

married person of either sex to a brothel or assignation house, unexplained, creates a presumption of adultery, although the doctrine is not without some opposition. Evidence of familiarity between a married person and one of another sex is competent as tending to show adultery, and no rule can be laid down of absolute precision as a guide. The evidence of children, servants, detectives, and the *particeps criminis* is competent, although that of the two latter is taken *cum salis grano;* in fact, I have known of judges to refuse to hear either of the two latter classes. In a charge of adultery on the part of a wife, evidence of her indiscretions with other men, is competent to illustrate the main issue.[1] And in adultery charged on the part of the husband, evidence of visits to other houses of ill-fame than the one charged, is admissible.[2] Some strange conflicts of law have occurred from the many diverse rulings of the various courts in reference to this matter. It has been held that a person who fraudulently procures a divorce in a foreign jurisdiction, and then marries, and returns to his original domicil, is guilty of adultery, notwithstanding the validity of the second marriage. So far as the right of the first to a divorce upon that ground is concerned, a confession of adultery, if there is no collusion, is good in evidence. Under the English law, as it was originally administered, adultery and cruelty were the only causes for divorce.[3] The Savior allowed of divorce for adultery, but the Roman church don't allow of divorce at all. In some States the wife's adultery is considered the graver offense. In Kentucky, lewd and lascivious conduct and behavior on the part of a wife, may be held as tantamount to adultery.

Rhode Island and Iowa.—It has been held that an insane person cannot commit adultery, the animus being wanting. In pleading the commission of adultery, the time, place and person with whom, must be stated as definitely as can be. A motion to make more definite and certain, or for a specific bill of particulars will be allowed, if not done; likewise a new

[1] 2 N. Y. S., 89. 8 N. Y. S., 47. 54 Hun., 490. [2] 9 N. Y. S., 583. [3] 42 Hun., 524.

trial might be granted on ground of surprise. It is always salutary and a good practice to state the case in this respect as plainly as can be done. It is not technical libel to name a co-respondent or *particeps criminis*, unless it is clearly groundless and malicious. It is usual also to add, as a formal allegation, "that the defendant did likewise commit divers other acts of adultery with some other persons or persons, and at divers other times and places to your orator unknown:" and, under such allegation, other instances may be shown. An insane person cannot commit legal adultery, but a sane person may be guilty of adultery with a lunatic, slave, or child; it must simply be a human person of the opposite sex. * * * "Whatever convinces the judge or jury of the consummation of the act (adultery) will be sufficient for their purpose. It is a fundamental rule that it is not necessary to prove the direct act of adultery, because if it were otherwise there is not one case in a hundred in which that proof would be attainable; it is very rarely indeed that the parties are surprised in the direct fact of adultery. In every case almost, the fact is inferred from circumstances that lead to it by fair inference, as a necessary conclusion, and unless this were the case, and unless this were so held, no protection whatever could be given to marital rights.[1] What are the circumstances that lead to such a conclusion cannot be laid down universally, because they may be infinitely diversified by the situation and character of the parties, the state of general manners and by many other incidental circumstances, apparently slight and delicate in themselves, but which may have most important bearings in decision upon the particular case. The only general rule that can be laid down upon the subject is that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion. The plaintiff's husband has been permitted to prove that the conduct of his wife, during his absence, was so indecorous as to induce a lady with whom she resided to recommend her re-

[1] 2 Greenl. on Ev. 35, 37. 2 Phil. on Ev. 211. 2 Hag. Consist. page 2.

moval to her mother.[1] The fact of adultery is to be inferred from circumstances that naturally lead to it by a fair inference as a necessary conclusion. The direct fact of adultery can seldom, if ever, be proved.[2]

* * * Courts and juries are compelled to determine the question from the behavior of the parties and from a great variety of circumstances, either of which, when considered alone, would be insufficient to prove * * * the charge, but, when considered together, may be, and frequently are, amply sufficient to establish the offence.[3] It, like all other charges, may be established by circumstantial evidence; and the evidence need only, when considered together, convince the mind that the charge is true. * * * The circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion.[4]

A confession of adultery written by the wife in the presence of, and under the eye of, the husband is presumed to be procured by his coercion, and is not a safe basis upon which to build up and support a charge of adultery against the wife.[5] Boastful admissions by defendant of adultery—*held*, insufficient to justify a divorce.[6] A married man going to a brothel is presumptive of adultery, but is not conclusive, and may be explained.[7] A divorce will not be granted for the adultery of the wife committed through the husband's procurement.[8]

CRUELTY.

This was a twin cause of divorce, by the English law, with adultery. The degrees of cruelty, authorizing divorce by our American courts, are almost infinite. Even the disparity of definitions of legal cruelty in the American statutes is very wide, some requiring harsh, brutal, bodily injury, long continued, while others are content with harsh treatment which causes mental anguish. A reference to the statutory causes

[1] 3 Hagg. Ecc. 310. [2] 82 Ill. 584. [3] 64 Ill. 333. 1 Edw. Chy. 14. Port 467. [4] 3 Green Chy. 444. 1 C. E. Green. 122. 3 Sandf. 307. 5 Iowa 204. 6 Law R. 141. [5] 37 N. J. Eq. 603. [6] 62 Iowa 82. 1 Green Ch. 139. [7] Walker Chy. 48. 4 Porter 467. [8] 30 Gratt. 307. 3 Pick. 299. 51 Ill. 162.

will render this apparent. So far as the ordinary cruelty could be defined, it was done by Sir William Scott negatively, thus, and which has been followed by courts constantly since: "Mere austerity of temper, petulance of manners, rudeness of language, want of civil attention and accommodation, even occasional sallies of passion, if they do not threaten bodily harm, do not amount to legal cruelty. They are high moral offenses in the marriage state, but still do not amount to that cruelty against which the law can relieve."[1] The Illinois courts in the case of Vignos, 15 Ill., 186, required very substantial acts of cruelty to fulfill the design contemplated by the statute.[2] But under the same statute, the court, some years later, in Farnham, 73 Ill., 497, "roared as gently as a cooing dove,"[3] thus showing the instability of the law, when guided by sympathies. No rule could be laid down on this subject. The courts have ventured many definitions, but they will afford no apt rule for future cases—it will depend chiefly on the quality of judge one has to deal with. When a wife is ill, it is cruelty to neglect her and treat her in a harsh and imperious manner. It is also cruelty to bestow a venereal disease upon her.[4] It has been held to be cruelty in a wife to entrap a husband to commit adultery.[5] A false and unfounded accusation of adultery to the wife has frequently been held to be cruelty.[6] Insisting upon coition with sick wife and using violence, and writing coarse letters to her, constitute good cause of divorce by reason of cruelty,[7] but compelling wife, not ill, to sexual embrace, is not cruelty.[8] *Aliter* in a Michigan case.[9] A refusal of wife to sexual act no cause or excuse for cruelty.[10] Nor is it legal cruelty to so cohabit. A vulgar husband was wont to practice masturbation in presence of his wife, but did not compel her to remain—*held*, not cruelty.[11] A husband may press his wife to such a degree of sexual intercourse as to make it cruelty, but it would require a great deal. I had one such case, but the husband had

[1] 67 How. Pr., 20. 85 Cal. 251. 7 So. Rep., 864. [2] 15 Ill., 186. [3] 73 Ill., 497. 56 Mich., 50. 32 N. J. Eq., 475. [4] 17 Abb. Pr., 231. [5] 17 Abb. Pr., 236. [6] 15 Ore., 626. 67 Tex., 198. [7] 33 Kan., 11. 18 Nev., 49. 62 Tex. 518. 61 Mich., 554. [8] 17 Conn., 189. 33 Ill. App., 223. [9] 61 Mich., 554. [10] 2 Brews., 211. [11] 141 Mass., 495.

erotic mania. Throwing water in face or spitting in face, legal cruelty.[1] Whipping wife, cruelty, but she must not provoke such treatment. It has been held in many cases that mental torture might be of so aggravated a character as to amount to cruelty, with a mere trifle of physical ill-treatment.[2]

Lord Stowell says: "The definition of legal cruelty is that which may endanger the life or health of the party. It generally proceeds from the wife as the weaker person, but it may come from the man, and has done so in several cases, but generally the wife complains of what is dangerous to her, on the showing of which the court releases her from cohabitation."[3]

It is for witnesses to state the facts, and the court will then determine whether it amounts to cruelty, and the jury will determine if it occurred. The time was in England when the husband could whip his wife with a stick not larger than his thumb, but courts are adjudging less and less abuse to be cruelty. Cruelty is conduct which endangers the life or health of complainant and renders cohabitation unsafe and intolerable. To constitute legal cruelty, there must be good ground to apprehend danger to life, limb or health. There must be a reasonable apprehension of bodily hurt.[4]

Words of menace intimating a malignant intention of doing bodily harm and even affecting the security of life, are legal cruelty.[5] The court is not to wait till the threats are carried into execution, but is to interpose when the words are such as might raise a reasonable apprehension of violence, and excite such fear and terror as make the life of the wife intolerable.

Cruel treatment does not always consist of actual violence. There are words of false accusation that inflict deeper anguish than physical injuries to the person—more enduring and lacerating to the wounded spirit of a gentle

[1] 31 Iowa, 451. [2] 76 Ga., 319. 18 Nev., 49. 23 Fla., 324. 30 Gratt., 307. 23 Ia., 433. [3] 2 Phillim. 132. [4] 2 Paige, 501. 36 Ga., 286. 4 Wis., 135. [5] 1 Hagg. Ecc. R., 773. 1 Edw., 278.

woman, than actual violence to the person, though severe.[1] Words of abuse and reproach create only resentment and are not legal cruelty. Even a threat of violence, when none is offered, does not constitute a sufficient ground for divorce.[2] The charge of cruelty must be sustained by grave and weighty facts which show that the duties of the married life cannot be discharged.[3] Tantalizing language on the part of the husband, supplying his wife with scanty clothing when his means are ample, and other acts of meanness, will not sustain the charge. Smashing dishes, using grossly improper language, and threats to kick from the house, are insufficient to establish a charge of cruelty as ground of divorce.[4] Pulling or twisting a wife's nose in a harsh and vulgar manner, when done but once, does not constitute cruelty in the sense that the wife's life is thereby rendered burdensome and intolerable.[5]

Cruelty may be said generally to be when the husband has so treated his wife, and manifested such feelings toward her, as to have inflicted bodily injury, to have caused reasonable apprehension of bodily suffering, or to have injured health.[6] To sustain a bill * * it is not sufficient to show a single act of violence on the wife's part, or even a series of acts; he must establish such a continued course of bad conduct on the part of the wife toward himself and and those under his care and protection as to satisfy the court that it is unsafe for him to cohabit or to live with her. Hence, it is proper to set forth acts of violence and misconduct toward the complainant, children, visitors and servants.[7] Duress or threats, tending to injury to health, or terrifying a wife into immorality, publicly outraging a wife's feelings by insulting language and assaulting her, even though no personal injury be inflicted; a violently intended but futile assault, or spitting on a wife; habitual insult and violence of temper, inducing quarrels and producing physical suffering; knowingly or reck-

[1] 73 Ill., 500. [2] 1 Hagg. Ecc., 773. 2 Sneed, 716. [3] 4 Wis., 135. [4] 24 N. J. Eq., 33 [5] 37 Pa. St., 225. [6] 1 Sw. & Tr., 168. [7] 1 Barb. Chy. 516.

lessly imparting a venereal disease; unreasonable denial of usual necessaries and comforts, so as to affect health[1]; cruelty to children in the mother's presence, in order to wound her feelings, and to such an extent as probably to be injurious to her health.[2] Menaced violence, such as threatening to cut an arm off, or to run the body through with a red-hot poker, while at the same time brandishing it, and other exhibitions of passion which might terminate in actual violence, are sufficient to found a case of legal cruelty.[2] It is conduct which endangers the life or health of complainant, and renders cohabitation unsafe. Court must determine what conduct is cruelty, and the jury must decide if it took place.[3]

It has been held that cohabitation does not imply any condonation for acts of cruelty. As cruelty usually proceeds from the male to the female, the presumption is that a wife would yield her person to a cruel husband on demand, or even voluntarily, to avert acts of cruelty, rather than that she had, by such acts, condoned the cruelty.[4] An utter refusal of the husband to have sexual intercourse with the wife, held not to be cruelty; in such case, in the absence of an express statute, there seems to be no relief, although some courts might construe it to be desertion.[5] A husband who unreasonably and forcibly effects sexual intercourse with his wife, to the injury of her health when he knows the injury and suffering it will inflict on her, is guilty of intolerable cruelty, such as will authorize a divorce.[6]

Cruelty is usually manifested in physical acts, but not always, but conduct sufficient to create a reasonable apprehension of physical violence is enough.

The law has been thus variously stated: Judge Creswell stated it to the jury thus: "It will be for you, on a consideration of the evidence you have heard, to determine whether the husband has so treated his wife, and so manifested his feelings toward her, as to have inflicted bodily

[1] 21 L. T. 564. L. J. P. & M. 37. [2] 2 Add. 382. 3 N. C. 340. 1 Add. Ecc. 29. [3] 2 J. J. Marsh, 322. 11 Ala. 620. 22 Cal. 358. [4] 19 Ill. 344. 2 Paige. 108. 1 Rob. 634. 6 Mass. 69. 9 Barr. 449. [5] 23 Pa. St. 343. 2 Brews. Pa. 511. [6] 17 Conn. 189. 58 N. H. 569.

injury, to have caused reasonable apprehension of bodily suffering, or to have injured health."

One of our own judges defined it "to be such conduct on the part of the husband as will endanger the life, limb or health of the wife, or create a reasonable apprehension of bodily hurt. What must be the extent of the injury, or what particular acts will create a reasonable apprehension of personal injury, will depend upon the circumstances of each case." In Illinois it was held that "extreme and repeated cruelty" was sufficiently shown by two blows given in anger, coupled with the fact that he "applied to his wife, not only in their private room, but in the presence of strangers," abusive language. This requirement is not sufficiently fulfilled by an alienation of affections. In some States it has been held that threats coupled with a present ability and apparent purpose to carry them into effect are sufficient; unfounded accusations of adultery and other malignant abuse, joined to slight acts of violence, are sometimes sufficient. In the case of Bailey vs. Bailey, 97 Mass., 373, under a statute where the *delictum* was "extreme cruelty," court said: "Where a divorce is sought on the ground of cruelty, whether it be cruel and abusive treatment, or cruelty in neglecting or refusing to provide suitable maintenance for the wife, a reasonable construction of the statute requires that it shall appear to be at least, such cruelty as shall cause injury to life, limb or health, or create a danger of such injury, or a reasonable apprehension of such danger upon the parties continuing to live together. This is broad enough to include mere words, if they create a reasonable apprehension of personal violence, tend to wound the feelings to such a degree as to affect the health of the party, or create a reasonable apprehension that it may be affected."

Insulting and degrading language used by a husband to his wife is not ground for a divorce.[1] In case of actual cruelty, such language may be shown in aggravation.[2] A divorce

[1] 69 Ala., 84. [2] 73 Ill., 497.

will not be allowed on the ground of extreme cruelty when the complaining party wilfully provoked the violence complained of, unless such violence was largely in excess of the provocation therefor.[1] In a case of violence toward wife sufficient to authorize a divorce for cruelty—*held* not excused by the fact that the wife had bad temper, and conducted herself badly toward her husband.[2]

It has been deemed cruelty for a husband to openly consort with prostitutes.[3]

Evidence that a husband repeatedly threatened to strike and to kill his wife—*held*, to justify a decree of divorce, although he never, in fact, inflicted any great physical injury upon her.[4]

If wife applies for a divorce on the grounds of cruelty, the husband may defend successfully by showing adultery on part of wife.[5]

Cruelty, to justify a divorce, must be unmerited and unprovoked, or wholly disproportionate to the provocation given.[6]

A single whipping of a wife is "extreme cruelty" sufficient for a divorce, nor can any words uttered by the wife afford adequate provocation.[7]

On suit for divorce for husband's cruelty in striking his wife, her bad temper and petulant manners are no justification.[8]

Husband beat his wife, by reason of an ill-founded suspicion that she was going to poison him—*held*, she was not entitled to a divorce.[9]

Abusive language and letters by a husband to his wife, in which he said he did not believe their child was his, and charged her with being rotten at heart, and having procured abortions on herself—*held*, to constitute extreme cruelty.[10]

Two acts of physical violence committed by a husband,

[1] 56 N. H., 316. 46 Ill., 134. 4 Nev. 395. 8 N. H., 307. 14 Cal. 459. 5 Wis., 449. [2] 5 La. An., 32. 37 Cal., 364. [3] 40 Mich., 493. 60 Iowa, 397. [4] 31 Wis., 235. [5] 49 Vt., 195. [6] 11 Ore. 303. [7] 5 Mont., 577. [8] 16 Neb., 196. [9] 16 Neb., 453. [10] 33 Kan., 1.

apparently endangering the safety or health of the wife so as to incapacitate her for the proper discharge of her conjugal duties—*held*, to constitute extreme and repeated cruelty.[1]

Vile, profane, abusive language, and the charging incest on plaintiff's son, do not constitute grounds for divorce.[2]

It is "extreme cruelty," justifying a divorce, to expel a wife and a young and dependent stepmother, and make their separation a condition of taking back the wife.[3]

A man violently seized his wife, cursed her and drove her and her babe from his home, telling her not to return. His conduct before had been harsh, and her's exemplary—*held*, that for this one act of cruelty she was entitled to a divorce.[4]

Jealousy on a husband's part does not constitute such cruelty as to entitle the wife to a divorce; no malignant desire to harass and annoy her being shown.[5]

Single instances of neglect to furnish a wife support or medical attendance are not alone grounds for divorce.[6]

A wife sent anonymous letters to her husband's clerk, falsely charging her husband with criminal intimacy with the clerk's wife, and sent similar letters to the newspapers—*held*, extreme cruelty, justifying divorce.[7]

A husband is entitled to a divorce where his wife, without cause, has persistently charged him with infidelity.[8]

Falsely accusing a wife of unchastity, and of communicating to him a venereal disease—*held*, sufficient ground for divorce.[9]

That a woman has occasionally addressed her husband angrily and disrespectfully in the presence of others, and, for a few days, has refused to sleep in the same room with him, is no ground for a divorce.[10]

IMPOTENCE.

Impotence is, like adultery, a most potent and general cause for dissolution of the marriage contract, either by de-

[1] 16 Ill. App., 348. [2] 16 Neb., 15. [3] 53 Mich., 543. [4] 64 Tex., 1. [5] 12 Oregon, 437. [6] 60 N. H., 211. [7] 30 Kan., 712. [8] 49 Mich., 417. [9] 9 Ore., 525. 8 Ore., 100. [10] 61 Tex., 119.

cree of nullity, or of divorce. The statutes of every State make impotence a cause for nullity or divorce, but it has been held that, in absence of express law, courts will not decree a divorce for impotence.[1] Impotency has been thus variously defined: "The incapacity for copulation or propagating the species;" "It means, want of *potentia copulandi*, and not merely incapacity for procreation." [2] It is an incapacity that admits neither copulation, nor procreation. [3] And what the law refers to, is capacity for *copula vera*, and not partial, imperfect and unnatural copulation. The incapacity must also be incurable. [4] Again, it is defined as "want of procreative power in the male."[5] (Barrenness is sometimes, but incorrectly, named as synonymous). Physical incapacity and impotence are the same. Impotence has been thus classified: *Male*: (1) Physical, (2) Moral or Mental, a Age, b Malformation or defect of male member, c Defect or disease of testicles, d Constitutional disease or disability. Impotence in female, (a) Narrowness of Vagina, (b) Adhesion of Labia, (c) Absence of uterus, (d) Imperforate hymen, (e) Tumors in Vagina. In the male, it will be either malformation of genitals, or want of action; in the female, she must be so malformed as to bar coition; mere barrenness or want of activity will not suffice. Either one of the parties may sue. If the impotency be denied, the defective party must submit to an examination, if ordered by court. Sometimes relief will be denied, if complainant, being impotent party, wont be examined, and sometimes court will force an examination.

If parties were sound at time of marriage, and impotency occurred not till after marriage, no relief will be given, even if the incontinence of husband produced the impotency, although there are *dicta*, contrariwise.[6] If a man marry a woman past the age of child-bearing, he can't be heard to complain if she be unfruitful. If a defect is curable by medical or surgical treatment, the party should be cured, if it

[1] 24 N. J. Eq. 19. [2] Black Law Dictionary. [3] Burrill's Law Dict. [4] Bouvier Law Dict. [5] Whar. & Stille Med. Dict. [6] 5 Fost. 267, 5 Paige, 554.

be not a dangerous operation; if it be dangerous, he or she need not;[1] but a refusal when safe, in some jurisdictions, would be cause, in others not, for divorce or nullity.[2] A court may decree impotency on the unsupported evidence of the wife.[3] Parties may be impotent as to each other, though both are structurally sound, but an examination must be had to determine this delicate matter. There have been cases when the male was abnormally large in a sexual sense, and the female unusually small in the same sense; they were perfect, but not adapted to each other, and it was legal impotence.[4] I once at Chicago produced a divorce for a New York city female, on the ground of cruelty, but she informed me that she and her husband made counter-charges of impotency, and were both examined, and he was pronounced impotent, and she not, yet she had a child by her husband. When examinations are held, either a physician, or two experienced women, make the examination. It never devolves on the court or jury. If a woman is so extremely sensitive in a physical sense, that she cannot submit to the sexual embrace, she is impotent; it must be a physical and involuntary inhibition, and not merely an aversion to it. The requirement on the part of the female is that she have the physical adaptation to perfect *coitus*, not that she shall be fruitful; she may be barren, but, if physically sound, that is no objection. Impotency in the female was decreed when the vagina was half the normal depth only, and no uterus at all. *Imperfect* sexual contact could be had, but the court deemed that insufficient; the facility must be for *perfect* coitus. Similarly of the male; the contact, including emission, must be complete; in other words, both parties must have the adaptation for everything antecedent to actual procreation, and that is sufficient, even if procreation does not ensue. A mental refusal of either to cohabit does not constitute impotence; it may constitute cruelty or desertion, but never impotence. In some States a marriage is *void ab initio* for impotence; in others *voidable* only, and parties may live

[1] Wright, 518. [2] 6 Paige, 175. [3] 7 Pa. Co. Ct. 595. [4] 89 Ala. 291.

together if they choose; in still others, the court will decree nullity of marriage. It was one of the canonical causes for divorce. The object of marriage is held by law to be both the sexual embrace *and* procreation, and I assume the only reason to be why want of procreation alone is not cause of divorce is, that it cannot be determined which party is in fault. If both are sexually perfect, this cannot be known, and both must be sexually perfect, else impotency exists.

In speaking of impotency, in the pleading, it is sufficient to merely state that the defendant was, at the time of the marriage, and is still, incurably impotent; if a bill of particulars be demanded and allowed by the court, no consideration of delicacy can avert a disclosure, and in arraying the evidence, the facts which constitute the impotency, must be stated, however disgusting and revolting, because impotency is a question and conclusion of law, to be drawn from the facts by the courts; the language may be veiled, but the evidence must be explicit. Where parties who are impotent (or either is) choose to live together, it is not probable the law would interfere, but in jurisdictions where such marriages are *void ipso facto*, property rights must be adjusted as if there was no marriage; the alleged wife would not have dower, nor inheritance, nor the right of administration; of course she might be a legatee under a will. They could not be proceeded against for adultery, for if capable of that they were not impotent, and there could be no *personal* objection urged against such an union. A case is recorded where a suit to declare nullity of marriage by reason of impotency was ended, and the parties lapsed into the nominal marital state; the objection was made by the lower divorce court that a continuation of such unions was against public policy as tending to immorality, but the court overruled the objection and allowed the suit to be discontinued.

On a bill by the husband for the wife's impotence, she will be compelled to submit to a surgical examination. The

marriage of one affected with congenital imbecility declared void at suit of his guardian.[1]

When a wife, seeking a divorce on the ground of the impotency of the husband, admits that she lived with him for ten years, during all which time he was impotent, her living with him and making no complaint, is a circumstance which may be considered as tending to show her story a fabrication.[2]

DESERTION.

This is wholly a statutory cause. The unwritten law of divorce knows nothing of it. Different phrases are used in different States; as "abandonment," "separation," "desertion." The distance they are apart is not material; they may, in some cases, live in the same house, and yet be desertion; a mere refusal of conjugal intercourse is not desertion, nor is separation by consent,[3] nor yet absence on business, even if it continues beyond statutory time, but unwarrantable refusal of conjugal intercourse for two years by wife is desertion,[4] *Aliter; 78 Me. 548.* If a wife be compelled to leave home by cruelty, it is the husband's desertion.[5] It was held that the refusal of wife to occupy nuptial bed the first night, and leaving home next morning, declaring an intention not to return, was desertion.[6] A husband must not desert wife because she refuses sexual contact.[7] There are three things necessary to constitute desertion (1) cessation of cohabitation, (2) intention to desert; (3) desertion against will of complainant.[8] Refusal of wife to follow husband to new domicil established by him, is desertion.[9] Non-support is not desertion—mere absence of cohabitation is not.[10] If a wife refuses to live or go with husband, because of his poverty, it is desertion. A party, having deserted the other, may offer to return, and, if party refuses, from thence it is desertion, by refusing party. If a husband drives his wife away, it is desertion by him. A husband has a right to determine the domicil, and wife must follow, else it is desertion by her; if her health wont admit of change she

[1] 1 H. Lucas. 538. 5 Paige 554. 9 Paige 25. 22 O. S. 271. [2] 93 Ill. 375. [3] 3 Pitts. 25. [4] 36 Ill. App. 31. [5] 39 N. W. Rep. 492. [6] 57 Io. 370. [7] 21 N. J. Eq. 331. [8] 33 N. J. Eq. 204. [9] 29 N. J. Eq. 96. [10] 2 Brews. 511.

need not follow. If she changes her domicil, her husband need not follow her. Wife must adhere to her husband, even if he be worthless. If one party uses violence, and the other party escapes or flees to escape the violence, it is desertion by the one using or employing the violence. The desertion is broken by an offer to return. The only causes which will justify desertion are those also which would justify divorce; of course, an insane person cannot desert, legally. Adultery, cruelty and desertion are the three chief *delicta* justifying divorce. Where an efflux of some time, as two years, must take place before the cause is complete, if there be a *bona fide* offer to return before the statutory period is complete, that annuls it as cause for divorce. If then the party at home refuses to receive the original offender back, he or she commences the technical offence of desertion from that period. The reasonable cause which will justify one party in abandoning the other, must be such as would justify a divorce.[1]

Separation, and intention to abandon, must concur, in order to constitute the ground for divorce.[2] If one leaves the other on business, and afterward determines not to return, the desertion would commence from the time the intention was formed.[3]

Desertion, as a cause for divorce, must be without any sufficient cause.[4] Impropriety of language, and the indulgence of bad temper on the wife's part, will not justify the husband's desertion.[5] When a wife separates from the husband, with his consent, he is not entitled to a divorce on the ground of her desertion.[6]

If a husband compels his wife, by his extreme cruelty, to abandon their home, she does not, by that act, desert him. But if he designs by this cruelty to drive her from home, he thus deserts her.[7]

A husband who without just cause makes a charge of infidelity against his wife, and thus drives her from home, abandons her in a legal sense.[8]

[1] 23 Pa. St. 343. [2] 14 Tex. 356. [3] Wright 224. [4] 29 Vt. 148. [5] 29 Ala. 719. [6] 31 Miss. 24. [7] 3 Stockt. 256. [8] 37 Ala. 393.

Separation by consent or acquiescence, is not desertion.[1] When a wife leaves a husband on account of his drunkenness, it is not desertion on his part, entitling her to a divorce.[2] When husband and wife live apart by consent they cannot charge each other with desertion from bed and board, with the intention of a voluntary abandonment.[3] Abandonment by the wife is not a good ground of divorce, when an unfounded charge of infidelity made by the husband, and never retracted, is the sole cause of separation.[4] A wife cannot compel her husband to maintain her, while she refuses to go and live with him, without justifiable cause.[5] Where a wife insists on her husband leaving her because of his failure to support the family, his leaving her is not desertion.[6]

Desertion consists in declining longer to cohabit, and the intent in the mind of the delinquent to desert the other.[7] A wife leaving her husband because he could not support her, or because of his abuse or neglect, is not desertion.[8] Refusal by the wife, of marital intercourse with her husband, does not justify him in deserting her.[9]

Separation is not desertion. Desertion is a cessation of cohabitation with an intent to desert, persisted in, without cause, for the statutory period.[10] A wife who leaves her husband's house because he keeps his prostitute in it, is entitled to a divorce and alimony.[11]

Habitual drunkenness is cause for divorce in most jurisdictions, under varying conditions—it means *alcoholism* in all cases. The opium and chloral habit is not legal drunkenness, but in the State of Mississippi that habit is made a specific cause. Technical drunkenness is not completed by a single act of inebriety, but must assume the force and violence of a habit. I once brought suit against a wife for custody of a child (she having been previously divorced) on the ground of habitual drunkenness; she convinced the court that her husband learned her to drink, and I was defeated.

[1] 35 Mich. 461. [2] Wright, 210. [3] 13 Ala. 145. [4] 17 Ala. 499. [5] 17 Ill. App. 439. [6] 35 N. J Eq. 20. [7] 5 Color. 55. [8] 43 Conn. 313. 27 N. J. Eq. 328. [9] 6 C. E. Green, 331. [10] Wright, 249. [11] 41 N. J. Eq. 202.

But I am in doubt if that be good law: on moral grounds it seems right, but not technically. What "gross" or "habitual" drunkenness is, is a question of law for court to decide, then whether he be guilty or not, is a question of fact for the jury, when there is one, or also for the court if there is no jury.

An "habitual drunkard" * * * is one who has a fixed habit of drinking to excess, who frequently drinks to excess, who becomes intoxicated on every opportunity.[1]

Frequent and regular recurrence of excessive indulgence in intoxicating drinks, constitute a habit for which a divorce will be granted.[2] Testimony of experts thereon is properly excluded.[3]

Evidence that a husband had been grossly intoxicated as often as three or four times a year for a period of twelve or fifteen years, and remained in that condition from seven to ten days on each occasion; that at such times, he went or was sent to an asylum for inebriates, and that any undue excitement made him drink, is sufficient to justify a finding that he had contracted such gross and confirmed habits of intoxication as entitled the wife to a divorce.[4]

FRAUD, FORCE, ERROR, MISTAKE, DURESS.

Any of the above are causes of nullity of marriage under the ordinary chancery jurisdiction, even in the total absence of any divorce legislation whatever. They are all grounds for avoiding any contract, and this contract of marriage is no exception. Indeed, the law goes farther as to contracts of marriage, making the abduction of a female with a view of marrying her, a crime in every one of our States. In Arkansas, as we have seen, the penalty is death. The kind of fraud against which equity will relieve, either under a divorce statute or generally, must be substantial, and not fanciful or frivolous. As applied especially to divorce, it is held that in the absence of express statute (and which exists in but two or three States), ante-nuptial incontinence is not a good ground; parties must satisfy themselves on that subject before

[1] 34 Kan. 195. [2] 6 Mo. App. 602. [3] 126 Mass. 205. [4] 126 Mass. 205.

marriage, and the law will not relieve them. In Maryland, a divorce *a vinculo* may be had "for carnal conduct of wife before marriage, unknown to husband." In West Virginia a wife may obtain a divorce *a vinculo*, "when, prior to such marriage, the husband, without knowledge of wife, had been notoriously a licentious person." In Washington, a divorce *a vinculo* is authorized "for any cause deemed by court sufficient." In all other States ante-nuptial incontinence of either party is no cause; in Maryland, the ante-nuptial incontinence of the husband is no bar; and in West Virginia the same offence of the wife is no bar; while in Washington, either would be a bar, at the discretion of the court. In many of the States pregnancy of the wife before marriage, which pregnancy subsists at the time of marriage, is a statutory cause for divorce; but where there is no such statute, it is not clearly a cause. The weight of authority is that way, but there are decisions, *contra*.

If a person sustains a relation of trust and confidence to another, he or she must not take advantage of that relation, and the advantage it affords, to obtain a contract of marriage. Such relations are those of father and stepdaughter, mother and stepson, guardian and ward, lawyer and client, trustee and *cestui que trust*. The two former are inhibited in some jurisdictions on account of affinity, but even in other jurisdictions all such relations of trust and confidence must not be abused in this particular, and it would not require much proof in any of those, or other cases of trust and confidence, to annul a marriage between such persons. When imposition is practiced, or even an innocent mistake in the person, it will be cause to annul the marriage. If a female should impose herself upon a male as another and different person, the marriage could be annulled for either mistake or fraud, according to the animus with which she did it; similarly of a male. A marriage, when either or both parties are under the age of seven, is absolutely void without action, but the guardian or next friend of either one under age of consent

may have the nullity spread of record; and a marriage over seven, but under the age of legal consent, is voidable, and when the party attains the age of legal consent, he or she may maintain a suit to annul it, by the intervention of a guardian or next friend. Duress, like fraud, is a ground for avoiding all contracts, and is also so in case of marriage. It not infrequently occurs that a male is arrested for bastardy and is released on marriage with his victim. On principle, such marriage is void, but there have been cases where they have been upheld; but voluntary cohabitation after such forced marriage would render it valid. Parties are sometimes coerced to marry a victim of their seduction. All such marriages may be relieved against, on principle, unless voluntary cohabitation follows. A marriage without parental consent is valid, if age of legal consent is passed.

Concealment from her husband by the wife, of her unchaste character previous to her marriage, or false representations made by her on that subject previous to the marriage, to induce him to marry her, are not such a fraud as will support a judgment, declaring the marriage void.[1]

A woman's concealment from her intended husband of the fact that she had been the mother of an illegitimate child, not good grounds for a divorce.[2]

Pregnancy before marriage.— * * * One of the leading and most important objects of the institution of marriage * * * is the procreation of children who shall with certainty be known by their parents as the pure offspring of their union. A husband has a right to demand that his wife shall not bear to his bed, aliens to his blood and lineage. This is implied in the very nature of the contract of marriage. Therefore a woman who is incapable of bearing a child to her husband at the time of her marriage, by reason of her pregnancy by another man, is unable to perform an important part of the contract into which she enters, and any representation which leads to the belief that she is in a marriageable

[1] 52 Wis. 120. 99 Pa. St. 196. [2] 8 Ore. 100.

condition, is a false statement of a fact material to the contract, and, on well settled principles, affords a good ground for setting it aside, and declaring the marriage void.[1] But as soon as the husband detects the fraud, he should cease cohabitation and take immediate steps to annul the marriage. (13 Cal., 87.)[2]

If birth of child occurs soon after marriage, presumption is that it is child of husband, but the presumption is repelled by the pregnancy not being far advanced, or husband not having known wife at date of conception, or bad character of wife, etc.[3] When husband wants to avail himself of this cause of action, he will fail, unless he is prepared to rebut the presumption that he is the father of the child [4] If the husband has had carnal intercourse with prospective wife, and she is then pregnant by another, he can get no relief.[5] If the husband was so situated that he might have known of the ante-nuptial pregnancy before marriage, he is not entitled to relief. If one is charged with bastardy, and marries the girl to get release, it is not deemed coercion, although the child be not his child.[6]

A man who had sexual intercourse with his wife before he married her cannot demand an annullment of the marriage on the ground that, at the time of its consummation, she was with child by another.[7]

Gross neglect of duty is a cause of divorce in some States, and may be committed by either. The most common neglect of duty on part of the husband, lies in not providing a suitable home and necessaries for his family, and treatment, nursing, medicines, attention and sympathy in illness. This duty is relative, and depends very much upon the husband's ability. If he does the best his abilities will allow, he is blameless, but if a man is in good health, he ought to be able to make his family comfortable, relatively. There are many ways in which he could care for his family besides

[1] 3 Ala., 605. [2] Wright, 630. 5 Blackf., 81. 5 Paige, 43. [3] 1 Grant, 377. 29 Pa., 420. 13 Ire., 502. 2 Brock., 256. [4] 77 N. C., 304. [5] 97 Mass., 330. 12 Allen, 26. [6] 3 Dev. L., 535. 5 Paige, 43. [7] 40 N. J. Eq., 412. 37 N. J. Eq., 195.

furnishing money. He could, if unable to provide servants, himself aid in the household duties—minding the children, doing rough chores, etc. A court can generally decide if a man is sedulous to do the best he can in making his family comfortable, according to his ability. The neglect of duty of the wife consists in neglecting her home and family, and in denying to her husband the conjugal embrace, as he may wish. As to the former, the care of the home and the children devolves upon the wife. She should, within her means, make her home cheerful, attractive and happy. She is usually the arbiter of the good or ill fortune of the home. She should not only be and remain at home at suitable hours, but should introduce as much good cheer as is possible, compatible with her means to do so. She should take care of the morals, manners and health of her children, and should co-operate with her husband in their suitable education. The courts cannot and do not expect to be able to prescribe or enforce an ideal home, but an adverse policy to the above may be so pronounced as to bring the delinquent within the terms of the reprobation of the law. As to the second branch, the object of marriage is threefold: First, the procreation and rearing of children; second, the mutual care, nursing in illness and comfort of the husband and wife; third, the mutual exercise of the conjugal embrace; and as to this, all I need say is that the husband is presumed to take the initiative, and the wife to respond; and if she is remiss in this, the law will not relieve against the necessary application of force, within bounds, to enforce submission. And it will sometimes deem the marital contract forfeited on her part by a long-continued persistence in refusal. I may add that this on the part of the husband is also a duty which he must perform at his peril. The law properly assumes that mutual fidelity to the marriage vow in this respect is conservative of continence, marital chastity, and conjugal fidelity, and it desires homogeneity of interest and desire, on so important a matter. There have been several instances where wives have sought relief from

the marriage vow by reason of an alleged abnormal and indecent desire of the kind, discussed. But it requires a very extreme case to authorize relief. I recollect of a case being submitted to a jury in the Superior court of Cook county, Illinois, it being termed "cruelty." I am not advised as to the evidence, but the issue was found for the husband, and it may be stated, in a sentence, that when a wife is in reasonable health, she will be expected to yield to her husband in this respect, whether it accords with her tastes and feelings or not, and to justify any other course she must be prepared to show an abnormal desire, out of harmony with common experience, and altogether improper and unreasonable.

INSANITY,

as a ground for avoiding a marriage, must exist at the precise time of the marriage. If it exists before, or after, it is not a valid cause. If an insane person has a lucid interval, and, during the same, marries, it is valid. Likewise, it has been held, if an insane person marries and afterward becomes lucid, and while in a lucid condition cohabits, the marriage is thereby rendered valid.[1]

It has been expressly held that the blind or deaf and dumb are competent to contract.

MENTAL WEAKNESS OR IDIOCY.

Idiocy is a ground for pronouncing a nullity of marriage, but in an English case, Hannen, Ch. J., said: "The contract of marriage is a very simple one, which does not require a high degree of intelligence to comprehend. It is an engagement between a man and woman to live together and love one another as husband and wife, to the exclusion of all others."[2] And in a Delaware case, Houston, J., remarked: "It would be dangerous, perhaps, as well as difficult, to prescribe the precise degree of mental vigor or soundness and capacity essential to the validity of such an engagement, which, after all, in many cases, depends more on sentiments

[1] 2 Dana, 102. 3 Ired. Eq. 91. 1 Speers Eq. 569. 1 Fost. 52. 23 Mississ. 410. 28 Ala. 565. 5 Sneed, 57. 3 Rich. 93. 12 Mass. 363. 45 Barb. 529. [2] 10 P. D. 82.

of mutual esteem, attachment and affection, which the weakest may feel, as well as the strongest intellects, than on the exercise of a clear, unclouded reason, or sound judgment, or intelligent discernment and discrimination: and in which it differs in a very important respect from all other civil contracts."[1]

SODOMY.

While adultery is usually spoken of as the gravest marital sin, and while it is, for many different reasons, intensely wicked, detestable and inexcusable, comprising moral perjury, treachery, ingratitude and meanness, yet its offence is usually a *moral* delinquency; but sodomy is the lowest and basest act of both moral flagitiousness and physical indecency that the human mind can contemplate. Cases have drifted into the courts in England, but none in this country. The English courts reprobate this vile act as worse than adultery, and it is clearly apparent that it is so. In Rhode Island a divorce may be granted for "gross misbehavior, or wicked misconduct repugnant to, and in violation of, the marriage contract;" in Connecticut, "for violation of conjugal duty;" in Maryland, "for excessively vicious conduct;" in Alabama, for "commission of crime against nature;" in Louisiana and Texas, for "excesses;" in Washington, "for any cause deemed by court sufficient." So that, in those States, a divorce might be allowed for the commission of this odious crime, and in many other States, it would be authorized under the clause for cruel and inhuman treatment, or for intolerable indignities, or for extreme cruelty, etc., but there are States where under no express or implied provision could any relief be had against this act, and in such case there would be a serious defect of law, if and provided any considerable indulgence in this crime existed, which, however, does not. There is an indirect way of reaching the case, however, for its commission is a felony everywhere, and an offender could be proceeded against in

[1] 1 Houst. 308.

that way, and, if convicted, would lay foundation for a divorce.

INTOLERABLE TREATMENT OR OFFERING INDIGNITIES.

In a case which seems to have considered this subject fully, the court say that the treatment contemplated by the statute, included rudeness, vulgarity, unmerited reproach, haughtiness, contempt, contumely, studied neglect, intentional incivility, injury, manifest disdain, abusive language, malignant ridicule, and every other plain manifestation of settled hate, alienation and estrangement, but that such malconduct must be habitual, permanent and continuous.[1] A later court, in the same State, suggested that, in applying it, "Chancellors should act with great caution to avoid the gradual approach, by imperceptible steps, to the practice of holding all matrimonial bickerings, by which parties may render each other unhappy, to be valid grounds of divorce."[2] It has been held that the indignities need not be sufficient to hazard life.[3] An excessive use of opiates was deemed sufficient.[4] A false accusation of adultery may be sufficient.[5] It has been held unnecessary to use personal violence.[6] A husband introduced a prostitute in his own house and held sexual commerce with her, during the absence of the wife—*held*, insufficient.[7] In one case it stated that "if threats of violence have been made, accompanied by charges of infidelity and the withdrawal of intercourse, and the refusal to bed with the wife," was sufficient.[8] In another case, threats were made by a jealous husband, and he denied the paternity of the child with which she was now pregnant.[9] Still again, "insulting and disgraceful language by itself addressed to the wife by the husband may not be an 'indignity to the person' in a legal sense; and so, slight personal violence without injury to the body or health, of itself, will not justify a divorce, but both combined and frequently repeated" would suffice.[10] In an English case it was held that the rule was quite flexible, according to the station in life of parties.[11]

[1] 9 Ark. 507. [2] 38 Ark. 119. [3] 62 Pa. 206. [4] 5 Mo. 278. [5] 23 Mo. App. 169. [6] 44 Ark. 429. [7] 78 N. C. 102. [8] 4 Jones Eq. 82. [9] 2 Jones Eq. 392. [10] 76 N. C. 436. [11] 4 Eng. C. C. 310.

FAILURE TO SUPPORT.

In a New Hampshire case, the court said: "No neglect of a husband * * to make provision for his wife's support is a good cause of divorce, unless it was in his power to do so, and we are all of opinion that the husband cannot be considered as having the power to make such provision, within the meaning of the statute, unless he has property. It is not enough to show that he has been able to labor; it must be distinctly shown that he has actually had property sufficient to enable him to make such provision."[1] And Field, J., said: "The neglect must be such as leaves the wife destitute of the common necessaries of life, or such as would leave her destitute, but for the charity of others. If those common necessaries are provided by the earnings of either husband or wife, there is no wilful neglect. The earnings of both go into a common fund and become common property, the control and disposition of which belong to the husband, and when applied by him or with his assent for her support, and are sufficient for that purpose, there is no basis for a decree, and the application must fail. In the present case, the earnings of the wife (plaintiff) were sufficient for her support, and were applied to that purpose, and it does not appear that the defendant ever exercised control over them, or interfered with their use, * * nor does it appear that the defendant was at any time the owner of property sufficient to provide the necessaries of life. This should appear affirmatively on the part of the applicant. The ability * * * has reference to the possession by the husband of the means, in property, to provide such necessaries, not to his capacity of acquiring such means by labor."[2]

MISCEGENATION.

"Some courts appear to have held that a person should be regarded as ethnologically and legally "*white*," when his white blood predominated both in proportion and in appearance. Those least disposed to consider persons to be *white*

[1] I. N. H. 198. [2] 9 Cal. 476.

who have any proportion of African blood, have admitted that persons possessing only an eighth part of such blood should be regarded as (legally) white."[1] In North Carolina, "persons of color" are adjudged to be such as are descended from negroes with four white ancestors in consecutive generations. In general, all statutes which have legislated at all on the subject, have made such marriages void, *ipso facto*.[2] In Tennessee, the law provided that a marriage could not be contracted between white and black, and it was construed that such words were mandatory, and that such assumed marriage was null and void.[3] Several of the States, Oregon and Nebraska among others, tolerate miscegenation when the colored person has less than one-quarter negro blood, and that perhaps might be adopted as a general rule, but it probably would depend some on the local prejudices. It would be very difficult, in many cases, to determine how much negro blood was in a person, as the ancestors themselves might not be clearly defined as to proportions. Fortunately, there is but little tendency to miscegenation. No white with any self-respect will consort with any person of color, and negroes and mulattos themselves, as a rule, prefer their own color. Marriage between Chinese and whites, also between Indians and whites, are not interdicted, as doubtless they should be in the former case.

In North Carolina, it was held that if citizens of that State, which renders void a marriage between whites and blacks, should resort to South Carolina, where there is no such prohibition, and intermarry, in order to evade the North Carolina statute, and then return to the latter State, such marriage will, nevertheless, be void in that State;[4] but in a case where a white woman went from North Carolina to South Carolina, and there married a negro citizen of South Carolina, and, thereafter, the parties migrated to, and took up their residence in, North Carolina, the marriage was good

[1] 34 Me. 77. [2] 3 Ire. 455. [3] 2 Tenn. Chy. 216. [4] 76 N C. 251.

there. And, in fact, that would seem to be the philosophical and logical doctrine.[1]

The joining of any religious sect which denies the validity or propriety of marriage, is a cause of divorce in three States. In New Hampshire it is coupled with a refusal to cohabit for six months; also Massachusetts and Kentucky. The Shakers, Oneida community and such, were referred to.

Conviction for crime or actual imprisonment for a felony, is a general cause, with some limitations. In some States a conviction and sentence to imprisonment for life, annuls a marriage *ipso facto*, nor will a pardon revive the marriage. In some jurisdictions, a conviction must be for a certain period, and the divorce cannot be applied for till a certain part of the sentence has been served out; in others, application can be made at once, upon conviction and sentence. In some jurisdictions, application may be made at any time after sentence; in others, it must be made during the life and term of the imprisonment. There are yet other States where a divorce may be granted for conviction of a felony before marriage, if unknown to complainant before marriage. The conviction must be of a felony or infamous crime and not a misdemeanor, except, in some States, a misdemeanor is sufficient. The proof required is the record of conviction and proof of identity.

INCOMPATIBILITY OF TEMPER, ETC.

Alienation of feeling, to any degree, is no ground for divorce.[2]

A constant series of annoyances, bickerings and contemning of the husband, do not constitute such extreme cruelty as will justify granting a husband a divorce from his wife.[3]

Misunderstandings and difficulties between husband and wife, attributable to a want of proper control of temper on both sides, lay no foundation for divorce.[4]

Refusal of wife to indulge her husband in sexual inter-

[1] 76 N. C. 242. [2] Brayt., 55. [3] 49 Mich., 639. [4] 34 La. An., 611.

course, and the declaration that she would never bear children to him, do not furnish good cause for a divorce. [1]

The wife's fear of having too many children is no ground for divorce.[2]

There are many other minor causes, for which see "Statutory Causes;" as gross misbehavior and wickedness inharmonious and incompatible with the marital relation. This simply authorizes a court, in its sound judicial discretion, to determine what offences, and their magnitude, will authorize judicial interposition. The unsophisticated person might think that nothing was needed to be consulted but the whim, caprice or wish of the judge. Such, however, is not the meaning of "sound judicial discretion." It means rather a discretion based on experience and enforced by the oath of office, discarding prejudice, expediency or sympathy. It also has the check of an appeal, and the court dare not, if it would, commit any flagrant breach of official obligations.

Public defamation is a cause in some States; i. e., if one party publicly slanders another, as to accuse of adultery and the like.

Offering intolerable dignities is a cause in several States.

MISCELLANEOUS.

A husband is entitled to a divorce when his wife, without cause, has persistently charged him with infidelity.[3]

Falsely accusing a wife of unchastity and of communicating to him a venereal disease—*held*, sufficient ground for divorce.[4]

That a woman has occasionally addressed her husband angrily and disrespectfully in presence of others, and, for a few days, has refused to sleep in the same room with him, is no ground for a divorce.[5]

Excessive sexual intercourse is ground of divorce, and the fact may be shown by the wife's testimony, which is not excluded on grounds of public policy or decency.[6]

[1] 3 Pitts Pa., 25. [2] Wright, 719. [3] 49 Mich., 417. [4] 9 Oregon, 525. 8 Oregon, 100. [5] 61 Texas, 119. [6] 58 N. H., 569.

IV.

DEFENSES.

As in other suits, so in this, the leading defense is a total denial of everything alleged in the bill or libel. In some States the answer must be under oath, in others the oath may be waived; in all jurisdictions the answer may be demanded under oath. Where this is required, such answer has the force of the evidence of two witnesses, or rather, it requires evidence to neutralize and overcome it, equal to two witnesses, or to one witness and further corroboration equivalent to that of one witness. A complainant usually waives the answer under oath when he or she can, and in such cases the answer has no force except as an admission of all facts admitted in the answer. Hence, when an answer is demanded not under oath, a defendant should not, as matter of policy, admit anything that cannot be easily proven; but anything that can readily be proven, or that it is no object to deny, should, also as matter of policy, be frankly admitted. The answer should admit or deny each allegation in detail, and at close, should contain a general clause, thus: "And the defendant specifically denies each and every allegation of said bill not heretofore answered in detail and in specific terms." If there are matters of avoidance to be pleaded they should be left till the matters of strict denial are disposed of, then they should be fully and specifically set forth; but, even though such matters be sufficient for defendant to obtain a divorce from complainant, no divorce can be granted until a cross-bill also

embodies them, and in such case those facts should be set out in the answer, in order to defeat the complainant, and also embodied in a cross-bill in order to obtain a divorce, for it is a rule of chancery practice that no affirmative relief can be obtained by a defendant on an answer. To obtain such relief he must become a party in his turn by, and through, the media of, a cross-bill. While both parties may be willing to be divorced, it frequently is of great importance which one secures the divorce, as, for example, a husband may charge his wife with adultery, which charge she must of course repel; but she may be able in a cross-bill to correctly charge him with adultery, and herself secure the decree for that cause. In that way, she does not necessarily forfeit dower nor alimony, but does get rid of an obnoxious husband.

In general, although parties can make no agreement for a divorce, they may make an agreement about alimony, and it will be respected. If they make an agreement to be divorced it will be a complete bar, even though a good cause exists, inasmuch as collusion is a complete bar. In charging adultery, it is usually needful to charge time and place and person with whom, if known. But it has been held in the English divorce court[1] that if such acts are sufficiently circumstantial it will not be necessary to specify time and place.

In Indiana, Kentucky, Louisiana, Vermont, Washington, and, in some cases, Michigan, the prosecuting attorney is required to appear and represent the interests of the defense in all cases of default. Courts are sedulous to observe that all defenses are genuine, and that the merits of a cause are exhausted on the part of the defense, and the court not infrequently takes a hand in the examination. The principal special defenses are collusion (but which is made by the court), condonation, connivance, recrimination, and limitation or *laches*, or neglect to sue in apt time.

[1] 3 Moo. P. C., 84.

COLLUSION,

as the term imports, is an agreement to do something not lawful or authorized. It has been variously defined thus: "A deceitful agreement or compact between the husband and wife, for the one party to bring an action against the other for a divorce, when there was no lawful cause;" or a secret understanding between husband and wife to proceed fraudulently against each other for a divorce.

If there is a sufficient cause there is no need to collude. They may agree together that no defense shall be made, or that the fault or cause shall be confessed, but they must not concur in manufacturing a cause for the purpose; but one party may, of his own motion, manufacture a cause simply to be divorced, which the other party, if in no wise implicated, may take advantage of. I once had a case where the husband took a female to a hotel and registered as "X. Y." (his true name) "and wife," and occupied a room together over night. The wife sued for divorce on account of alleged adultery committed at this hotel, and for proof, adduced the clerk of the hotel and the hotel register, together with the testimony of the wife as to the handwriting, and that her husband was not at home; and the hotel clerk and bell-boy testified that the female who shared the room with the husband was not the lady then present (the wife), and the wife added that she never was at the hotel, and had no collusion in this scheme. Suppose she had colluded in this? The divorce would have been denied. I also once was cognizant of a divorce where a really fond husband, by collusion, whipped his wife in view of witnesses to authorize a divorce, and the divorce was granted, but the collusion was suppressed.

Collusion has been thus defined by the courts: It may be by keeping back evidence of what would be a good answer, or by agreeing to set up a false case. Or, if it is an agreement between husband and wife, for one to represent in court that the other has committed a breach of the marriage

relation for the purpose of obtaining a divorce; and it will bar a divorce.

Confessions, also, are rigidly scrutinized, to see that they bear no marks of collusion.

In case of Danforth vs. Danforth, 105 Ill., 603, the parties made an agreement as follows, viz.: "It is hereby stipu-
"lated by the undersigned, that the within sum of $29,000 is
"deposited with the Union National Bank, Chicago, by George
"W. Danforth, as a special deposit, to be paid to Anna Dan-
"forth whenever she or her attorney produces a certified
"copy of a decree of divorce from said Anna Danforth in the
"Circuit Court of Iroquois County, Illinois, said divorce to
"be granted on or before November 10th, 1881, or said money
"to be returned to said Danforth. She is also to produce a
"certificate of the clerk of said Circuit Court that the lands
"described in a certain deed, dated October 28, 1881, from
"George W. and Anna Danforth to Almon G. Danforth, are
"free and clear of all encumbrances; and, further, shall also
"deliver to said George W. Danforth a certain contract of
"sale of land made by said Anna Danforth to one John F.
"Raumets and —— Fry, duly assigned by her to said Almon
"G. Danforth.

"Anna Danforth.
"George W. Danforth."

The husband procured the divorce on the ground of cruelty, and the wife withdrew from the bank, and appropriated to her own use, the $29,000. She then moved the court to vacate the decree on the ground of fraud and collusion. The lower court refused to do it, but the Supreme Court ordered it done, although the husband had died meanwhile.[1]

Where there is collusion between the parties, no decree will be made.[2]

Parties even with the very best of causes, have no right to make an agreement concerning it. It must be subjected to the absolute and unbiased arbitrament of the divorce court.

[1] 105 Ill., 603. [2] Wright, 243.

If a collusion does occur, and the court finds it out, it will dismiss the bill, regardless of the merits of the case. A party may admit the charges of the bill and co-operate toward a decree against him or her after the suit is brought, but the error would lie in agreeing outside of court either to perform some act as a cause for divorce, or to make some agreement out of court to aid it. Collusion in a divorce proceeding may be passive, as when the understanding is, that the defendant shall suppress facts which might be constituted a good defense. Collusion * * * may be by keeping back evidence of what would be a good answer. If a party to a suit, by agreement with the other, procures the withdrawal from the notice of the court of facts relevant to the charge which is imputed to him or her, that is collusion. The parties must be acting in concert, and some imposition upon the court must be the result. It is not collusion for a husband to allow his wife alimony during the suit, or for a wife to aid in the proofs against herself, but it is, if the husband allow such alimony in consideration of the wife's withholding facts which might imperil his suit. Of course, the party proceeded against may allow the case to go by default. Independent of any other consideration, if the motion was properly made and in due season, the court would order any judgment of divorce obtained by collusion or fraud to be set aside—not from any regard to the parties concerned, but from motives of public policy.[1]

CONDONATION.

It is "a blotting out of an offence (against the marital relation) imputed, so as to restore the offending party to the same position he or she occupied before the offence was committed."[2] The forgiveness by a husband or wife of a breach of marital duties on the part of the other party, as of acts of cruelty or adultery. It is either express or implied; express when signified by words or writing; and implied from the conduct of the parties, as a taking back to the matrimonial couch

[1] 41 Barb., 140. [2] 1 Sw. & Tr. 334.

the offender.[1] It has been termed a conditional forgiveness, being accompanied by an implied condition that the injury shall not be repeated.[2] Condonation is a conditional forgiveness, founded on full knowledge of antecedent guilt.[3] The term "condonation" necessarily includes that operation of the mind evinced by words or acts, known as forgiveness; the free, voluntary and full forgiveness and remission of a matrimonial offence.[4] Unless accompanied by that operation of the mind, even cohabitation without fraud or force is insufficient to establish a condonation.[5] After one of the parties has been wronged in a way that would warrant a divorce, if he or she voluntarily cohabits with the other party, it is a condonation of the offence.[6] Condonation is but a forgiveness on condition of subsequent fidelity; if not kept, the rights of the injured party are restored, as if there had been no condonation.[7] An offer by a wife to return to the society of her husband is not a condonation, unless accepted by him.[8] Condonation is a conclusion of fact, not of law; and means the complete forgiveness and obliteration of an offence against the marital state, followed by cohabitation, the whole being done with full knowledge of all the circumstances of the offence forgiven. Once accomplished, it is said the condonation is final.[9]

Condonation as a defence is a conditional forgiveness, after full knowledge of the offence.[10] It is a forgiveness on condition that the offence will not be repeated; if repeated, the condonation fails.[11] Condonation may be implied from circumstances, the most potent of which is cohabition, but other circumstances tending to show condonation, will answer.[12] It applies to cruelty as well as to adultery, although adultery is the offence generally condoned.[13] The return of a wife to nurse a sick husband, even if she stays months, is not condonation unless they cohabit together, and so long as the

[1] Shelf. M. & D. 436. [2] 4 Pai. 460. [3] 36 Ga. 286. [4] 2 Robt. 694. [5] 27 Mo. 383. Wright 475. 9 Conn. 333. [6] 10 N. H. 272. 4 Blackf. 131. 4 N. H. 272. 6 Mass. 69. 6 Mass. 147. [7] 32 Miss. 279. 19 Ill. 334. 27 Ind. 186. [8] 4 Paige 432. 25 Vt. 678. [9] 1 Sw. & Tr. 184. [10] 44 Ala. 437. 41 Ga. 46. [11] 73 Ill. 497. [12] 92 N. C. 129. [13] 34 Ind. 368.

husband remains in need of a nurse, condonation will not be presumed from their being together in the attitude of patient and nurse; but if he was able to have sexual commerce, and the wife passed the nights with him alone, such commerce might be presumed.[1]

The husband's condonation of the wife's adultery does not debar her from divorce from him on account of his subsequent adultery.[2]

Upon repetition of cruel treatment after condonation, the former wrongs are revived.[3]

Condonation is conditional. The subsequent commission of an offence which falls within the jurisdiction of a court is a violation of the condonation, and avoids it.[4]

The effect of cohabitation as a condonation of adultery is less binding upon the wife than the husband.[5]

If either party forgive the adultery of the other it cannot afterward be set up as ground of divorce without evidence of further guilt.[6]

The offences of adultery and cruelty are essentially different, and the same circumstances as respects condonation cannot be legally applicable to both, and cohabitation after acts of extreme cruelty is not a bar to divorce for that cause.[7]

CONNIVANCE.

Connivance is the willing consent to an adultery, in the sense of being an accessory before the fact; or a culpable acquiescence in a cause of conduct, reasonably likely to lead to the offence being committed.[8] Corrupt or guilty assent to wrong-doing, not involving actual participation in, but knowledge of, and failure to prevent or oppose it. To pretend blindness or ignorance, to forbear, or to seem not to see; forbearance of opposition or of disapproval.[9] Pretended ignorance of, or blindness to, the faults of others.[10]

The connivance of the husband to his wife's prostitution deprives him of the right of obtaining a divorce, or of recover-

[1] 26 Mo. 566. [2] 135 Mass. 386. [3] 87 Ind. 481. [4] 19 Ala. 307. 31 N. J. Eq. 225. 10 Paige 20. [5] 1 Edw. Chy. 439. [6] 10 N. H. 272. [7] 1 Bradw. 245. [8] Webster Dict. [9] Worcester Dict. [10] Stormouth Law Dict.

ing damages from the seducer.[1] It may be proved by implication. It usually implies a consent given while the offence or adultery is proceeding, and a consent given contrary to law or good morals; but does not imply any actual co-operation—only the bare assent or neglect to forbid or oppose. A divorce will not be granted for the wife's adultery, committed through the husband's procurement or assent.[2] When the adultery has been proven, a connivance destroys all claims to remedy by way of divorce. Connivance differs from condonation, though the same legal consequences may attend it. Connivance necessarily involves criminality on the part of the conniver; condonation may take place without imputing the slightest blame to the party who forgives the injury. Connivance must be an act of the mind before the offence is committed; condonation is the result of a determination to forgive an injury which was not known till after it was inflicted.[3]

A husband who connives at an act of adultery by his wife cannot complain of any subsequent act, whether with the same or another *particeps criminis*.[4] It is not connivance to watch a wife who is suspected, and catch her naturally, but without participating in any way, in her act.[5] But when a husband does catch his wife *in flagrante delicto*, and does nothing about it, it may be presumed that he connives at it.[6] Connivance is oftenest practiced in cases of adultery, directly and indirectly. It is the duty of the husband to watch over and guard the wife's honor. If he sees her tending toward any possibility of danger he should withdraw her from it. When a man marries he should not introduce her to his former companions whom he knows to be licentious, nor should he tolerate her associating with licentious persons of either sex. But it is no part of a wife's duty to watch over the husband similarly; he is presumed to be able to take care of himself. Connivance may be active or passive; it is equally fatal in either case. Where a husband was willing his wife should commit adultery if he could thereby obtain a divorce,

[1] 2 Caines 219. 3 Pick. 299. [2] Abbott's Law Dict. [3] 41 Barb. 114. [4] Gipps. 2 Sw. and Tr. 116. [5] 140 Mass. 528. [6] 109 Mass. 408. 142 Mass. 361.

frequently left her alone with her suspected paramour, arranging for some one to watch them, suffered them to go on excursions alone, and permitting him undue familiarity with her—*held*, such connivance as would prevent him from obtaining a divorce for her adultery.[1] A husband who either connives at, or assents to, acts of adultery by his wife with one man, can get no divorce for acts of adultery committed thereafter by his wife with others.[2]

RECRIMINATION.

This is a species of special defence which has been thus defined: "A counter accusation, an accusation made by the accused party against the accuser,"[3] or "a set-off by a defendant of equal guilt on the part of the complainant in a suit for a divorce on the ground of adultery,"[4] or "a charge made by an accused person against the accuser;[5] "in particular, a counter-charge of adultery or cruelty made by one charged with the same offence in a suit for divorce against the person who has charged him or her,"[6] or "an accusation made by a person accused against his accuser, either of having committed the same offence, or another.[7] In general, recrimination does not excuse the person accused, nor diminish his punishment, because the guilt of another can never excuse him. But, in application for divorce on the ground of adultery, if the party defendant can prove that the plaintiff has been guilty of the same offence, the divorce will not be granted.[8] In Massachusetts, it is well settled that a suitor for divorce cannot prevail if open to a valid charge, by way of recrimination, of any of the causes of divorce set out in the statute.[9] Recrimination as a bar for divorce is not limited to a charge of the same nature as that alleged in the libel.[10] It is sufficient if the recrimination charges any one of the causes of divorce of equal grade, so declared in the statute.[11] The general principle which governs in a case where

[1] 136 Mass. 310. [2] 21 N. J. Eq. 61. [3] Burrill's Law Dict. [4] Shelford on Mar. and Div. [5] Wharton's Law Dict. [6] 97 Mass. 531. 3 Blackf. 203. [7] 4 Paige, 432. 31 Barb. 330. [8] 17 Abb. Pr. 48. [9] 142 Mass. 362. 135 Mass. 389. 124 Mass. 394. [10] 142 Mass. 362. [11] 111 Mass. 327. 135 Mass. 389.

one party recriminates is, that recrimination must allege a cause which the law declares sufficient for a divorce.[1]

In this State (California) the statute has specified certain acts or conduct, which shall constitute grounds of divorce,[2] and, so far as the matrimonial contract is concerned, the courts cannot distinguish between them, whatever differences there may be in a moral point of view.[3] "The several offences must, therefore, be equally pleadable in bar to the suit for divorce—the one to the other within the principle of the doctrine of recrimination." Field, J.[4]

A wife cannot get a divorce for cruelty when her fault provoked it;[5] nor when cruelty is charged will the adultery of the complainant be pleadable in bar.[6] But this does not seem to be the general rule. A counter-charge of adultery will be a charge of adultery, no matter which adultery was prior in point of time. A counter-charge of cruelty will not bar a charge of cruelty, but a recrimination of adultery will be a defence to a charge of cruelty. Cruelty, which induces adultery, will be a complete defence to the adultery.

The following summary is believed to express the true state of the law:—

(1) Whereas, according to the English rule, cruelty is not a bar or defence to a proceeding whose gravamen was adultery; such is *not* the rule here; but cruelty *is* a bar here to adultery.

(2) In a divorce suit for any cause, any *delictum* for which the law provides the same penalty will be a complete bar, whether it be of the same kind or not.

(3) It is a defence to a divorce suit either *a vinculo* or *a mensa et thoro*, that either before, at, or after, the offence charged, the complainant was, himself, guilty of any fault which would authorize either sort of a divorce.

(4) A suit for a full divorce will be barred by the commission of any act or acts which justify a limited divorce.

(5) The offence offered in recrimination must be of a

[1] 97 Mass. 531. 4 Allen, 39. [2] 10 Cal. 249. [3] 124 Mass. 394. [4] 49 Vt. 195. 47 Tex. 336. [5] 31 Io. 451. [6] 40 How. Pr. 258.

nature which, if set forth in an original bill, would justify a divorce, either full or limited, else it will be unavailing.

(6) It does not matter what the *delictum* is, offered by way of recrimination, so long as it would authorize a divorce of any kind.

To a petition for a divorce for cruelty, adultery may be plead in recrimination.[1] A husband cannot resist a divorce for adultery by setting up desertion by the wife.[2] Where each party files a bill for divorce, one for cruelty and the other for adultery, and both charges are sustained, each will be considered a bar to the other.[3]

The defendant in a divorce suit may allege, by way of recrimination, the commission by the plaintiff of any offence which is a cause for divorce. If both have a right to a divorce, neither party has.[4] Recrimination is a good defence to an action for divorce for cruelty.[5]

LIMITATION, LACHES, DELAY AND INSINCERITY.

Unless some good excuse can be offered, a case is weakened and sometimes lost, through delay to bring suit. It is especially so as to the husband. He is presumed to know his marital rights and wrongs, and if he has a cause against his wife, the necessary presumption will be that he will move in the vindication of his wrongs, if they exist, at the first chance. He may sometimes justify his neglect or delay on the ground of want of funds. The wife is much more excusable. She is not presumed to know her rights or the mode of redress. It is a great task for her to go out into the world and seek redress. Timidity, modesty and unsophisticatedness, all restrain her. In some States there are express statutes of limitation, and they must be followed. In all chancery practice, *laches*, or neglect to sue, is a potent defense. There is no period of limitation, but, by analogy to the limitation of the law, equity establishes the same time in analogous cases.

A perfunctory mode of proceeding, when discovered,

[1] 29 Ga. 718. [2] 4 Porter, 467. [3] 39 Ala. 348. [4] 2 Post, 347. 39 Ala. 348 [5] 47 Tex. 336.

weakens the case. If a party, male or female, really has valid cause of divorce, he or she should urge it with celerity and earnestness, as if he or she was sincere and resolute to achieve the best results.

STATUTORY LIMITATION.

Action must be brought within *one year* in Oregon for adultery or conviction of felony; in Washington for adultery; in Idaho after the termination of imprisonment of adverse party; within two years for any cause in New Jersey; in California within two years if adultery; within same after termination of imprisonment sentence; in Indiana, same, if adultery. Within three years for any cause in Montana; in Minnesota, Wisconsin and Wyoming, for adultery. Within four years for any cause in Texas, Nevada, Utah, Florida, Nebraska and Arizona. Within five years for any cause in Illinois, Arkansas and Kansas; for adultery in Michigan, New York and Nebraska, and within five years from the commission of the act of adultery in Virginia and West Virginia. Six years for any cause in New Hampshire and Mississippi. Ten years for any cause in Ohio and North Carolina. In the Dakotas before such a time has elapsed as to establish a presumption of connivance, condonation, collusion, or acquiescence.

It will be noticed that in West Virginia the time commences to run from *commission* of adultery. In all other cases and in all other places, it commences to run only from time of discovery, unless due diligence to discover was not used. Not so about any matter of record, as sentence of imprisonment or pardon. Then the time commences from its date.

In cases of fraud, and the same principle applies for divorce, courts of equity will not interpose if a party slumbers on his (or *her*) rights unreasonably after the detection of the fraud or the means afforded of detection.[1]

Time, however, does not begin to run against a man or woman in cases of fraud until he or she has knowledge of the

[1] Angell on Lim., s. 190. Kerr on Fraud, 247.

fraud. Time begins to run only from the discovery, provided due diligence to make discovery was observed. The statute of limitations is no bar in equity in cases of unknown fraud. The right of the party defrauded is not affected by lapse of time, or, generally speaking, by anything done or omitted to be done so long as he remains, without any fault of his own, in ignorance of the fraud that has been committed. Lapse of time imputed as *laches* may be excused by the obscurity of the transaction whereby a man is disabled from obtaining full information of his rights. Time does not begin to run against a man (*or woman*) so as to bar the remedy, until he has full information of his rights and injuries, or has in his possession the means of knowledge, or at least has sufficient notice to put him on inquiry. * * * The objection of time is removed so long as a man remains, without any fault of his own, in ignorance of his rights and injuries, or is under a legal disability, or so long as the dominion or undue influence which initiated the transaction is in full force. The mere fact, however, of the poverty or pecuniary embarrassment of the injured or defrauded party is not a sufficient excuse for delay.[1]

In equity fraud is held to be an exception to the operation of the statute until discovery of the fraud. Fraud is a sufficient answer to the statute of limitations.[2]

[1] 28 Miss., 432. 18 Tex., 774. 8 Tex. 361. 2 4 Tex., 345. 68 Ill., 131. 52 Ill., 301. 104 Ill., 155. 46 Md., 257. 67 Me., 470 120 Ill., 377. 91 Ind., 27. 58 Ind., 194. 41 Barb., 139. 25 N. J. Eq., 60. 32 N. J. Eq., 495. 46 Mich., 511. [2] 8 Ga., 1. 1 Dana, 373. 25 Ga., 76. 40 Pa. St., 199. 6 Ala., 589. 36 Cal., 47. 31 Miss., 265. 5 Ired. L., 465, 6 Jones, L., 520.

V.

FOREIGN MARRIAGE AND FOREIGN DIVORCE.

Judge John A. Jameson, now deceased, formerly of the Superior court in Chicago, was one of the most erudite and scholarly judges who ever adorned the bench in that city. Moreover, while deprecating the laxity of divorce law and the frequency of divorce instances, he nevertheless, being obliged to administer that law frequently, studied and learned it as a science. An interesting case came before him, involving, to an unusual extent, the conflict of marriage and divorce laws in different countries, and he prepared and wrote out a learned and lengthy opinion citing authorities extensively, and which he, being an especial friend, furnished me with a copy of, which I here insert.

Madelaine Roth v. Frederick Ehman et al. In Chancery.

MARRIAGE.

1. Marriage valid by laws of Illinois, where contracted, though invalid by the law of Wurtemberg, of which parties are subject.
2. Parties afterward took up their domicil in Wurtemberg, and the court then declared such marriage a nullity.
3. In contest over real estate in Illinois, the decree of the Wurtemberg court recognized as controlling the status.
4. Community of estate created by contract in Wurtemberg will be recognized and enforced in Illinois.

JAMESON, J.—The principal facts in this case are, that in 1832, John George Roth, a subject of the kingdom of Wurtemberg, emigrated to Chicago, Illinois, and there, in the course of a business life of 24 years, accumulated the large property which is now in controversy in this suit. In 1854, Roth went back to Wurtemberg, apparently, for a visit only. Upon his return to America, in 1855, he was accompanied by the complainant, Madelaine Moser, a native and resident of Alsace,

then a French subject, whom he afterward married in Chicago. Differences arising between them, in 1856, they left the United States together, she going to reside with her father in Strasburg, and he taking up his abode in Schorndorf, in the kingdom of Wurtemberg. In 1863, Madelaine repaired to Chicago, and there instituted a suit for divorce from her husband. Learning of this fact, he followed, and settled his difference with her; the suit was dismissed, and they again left the United States, to which neither again returned during Roth's life. They settled down in Schorndorf, living together as man and wife. October, 1870, Roth commenced proceedings in a court of supposed competent jurisdiction in Schorndorf, to procure a decree of nullity of his marriage with the complainant, who, in November following, again went to reside with her father, in Alsace, either voluntarily, or, as she contends, compelled thereto by her husband. The decree was sought on the ground of the incapacity of Roth to marry, by reason of non-compliance with a law of Wurtemberg, passed in 1808, declaring void all marriages of the subjects of that kingdom contracted abroad without the license of the king. April 24, 1873, a decree of nullity was pronounced by the Wurtemberg court, although, whilst the proceedings were pending, the law of 1808 was repealed.

Madelaine appeared in this proceeding both in person and by her counsel, and resisted the entering of a decree. In September following, she released to her late husband all her interest in his property here and in Wurtemberg, upon receipt from him of $8,000, paid to her in United States bonds. About three months thereafter Roth married his second wife, Amalie Staehle, claiming now to be his widow, one of the defendants in this suit. In March, 1874, there was executed between Roth and the said Amalie an instrument in the nature of a post-nuptial settlement, called by the parties a "marriage and inheritance contract," by which, in accordance, as is claimed, with Wurtemberg law, the parties agreed to own in common or as a community, during their joint lives, the property of each, Amalie putting in her portion of 3,500 florins, and Roth his entire estate, subject to the payment of the debts of both, to the education and marriage portion of their children, and to the payment to his relatives of legacies to the amount of 80,000 florins, and giving the right to survivorship to the parties severally. This contract was con-

firmed by the Royal Notarial and Orphan's Court, of Schorndorf, on the first of April, following. July 12, 1872, Roth, being sick, though without apprehension of an immediate death, and anxious in regard to the ability of his wife to carry out the terms of the contract in favor of his relatives in case of his death, because of his heavy cash outlay in rebuilding after the Chicago fire, sent for a notary, and, with his aid and under his advice, executed an instrument purporting to convey the title to his Chicago property to one Albert Staehle, a brother of Amalie, his wife, with a view, as it is claimed, of enabling him, as agent for his sister, to make sales to raise money with which to pay the legacies. Nothing being paid by Albert Staehle, he was but a naked trustee, and the deed was not such in form as to convey the legal title. The interest acquired, if any, by this instrument, has moreover been reconveyed to the widow, Amalie Roth. In the afternoon of the day of the execution of this instrument, Roth died intestate. Some two months after his death, Madelaine, the complainant, came to Schorndorf from Alsace, upon a visit to her friends there, and, as she claims, to her husband's grave. While in Schorndorf, she was induced by friends of both parties with whom she was stopping, to visit the second wife, Amalie, now the supposed widow of Roth. Through these friends, however, before doing so, she received from Amalie 10,000 marks, and executed to her, before a notary, a general release of all her rights and interest in the property of her former husband. On the 3d of October, while still the guest of Amalie, Madelaine executed to her a formal deed, conveying all her interest in such property, and went with Amalie to Stuttgart and acknowledged the execution of the deed before the American consul there resident. During this visit Madelaine also received presents from Amalie, of some value. Some two years later, Madelaine caused this suit to be commenced, and left Alsace for Chicago, where she has since resided.

Her bill claims that she was lawfully married to Roth in Illinois, according to the laws thereof; that the proceedings in Wurtemberg resulting in the decree of nullity of her marriage were void, or, if valid there, are of no effect here upon the property in Illinois; that she is the widow of Roth, and, as such, entitled by law to one-half of the real estate, and all the personalty left by her husband, notwithstanding the mar-

riage and inheritance contract which is, as to her, void, as founded upon an immoral consideration; and that all instruments purporting to release or convey her rights and interests in such property, were procured from her by undue influence, and upon false suggestions and representations, and are in like manner void and of no effect. The bill makes the heirs-at-law, as well as the supposed widow of Roth, parties, and prays that the complainant may be decreed to have title to one-half of the real estate in Chicago, and that upon a partition between her and the heirs-in-law of said Roth, or others entitled, the same may be set off to her in severalty, and for general relief. To this bill Amalie has answered, denying all its material allegations. Bearing on the equities of the other defendants, the facts are, that after the death of Roth, considerable payments were made to them by Amalie on account of the legacies provided in the marriage and inheritance contract, and that upon the representation of Amalie through her brother, acting as her agent and attorney in fact, that she could not make the balance of such payments without selling a part or all of the Chicago property, quit-claim deeds were executed to her by all the legatees of their rights and interests in such property. In their answers to the original bill filed by Madelaine, these legatees admit the allegations made by her. And finally, all the defendants, including Amalie, have filed cross-bills setting up several equities, and praying that their rights may be established by the decree of the court; the legatees, moreover, averring that the quit-claim deeds were procured from them by false representations, and praying that they may be declared to be of no effect. Upon the issued raised by these pleadings, very voluminous testimony has been taken in Wurtemberg and read upon the hearing, and the court has had the benefit of very able and elaborate arguments by the counsel on both sides, upon the many questions of law and fact involved in the record. It will not be possible for me to discuss at large, or even to touch upon all these questions, and I shall content myself with an examination of the more salient and important of them, leaving my judgment upon others to be inferred from the conclusions announced on the whole case.

Few causes, I imagine, have ever arisen involving more of the complicated and interesting problems of private international law than this. By what law shall the validity of

the two marriages of the intestate Roth, be determined? By what, that of the decree of nullity of his marriage with the complainant? If that decree was valid by the law of Wurtemberg, how is it to be regarded by the courts of Illinois? What effect, if any, is to be given to the marriage and inheritance contract between Roth and the defendant, Amalie? What, to such of the deeds and releases as were executed in Wurtemberg, and what to those executed here? And, finally, Roth, himself a subject of Wurtemberg, having successfully married an Alsatian woman, a French subject, in Illinois, and a Wurtemberg subject in Wurtemberg, in both of which countries he was for a long time resident, what bearing, if any, do the nationality, the residence or domicil, temporary or permanent, of the several parties at the time of such marriages, have upon their validity?

As the domicil of Roth, and his wife, the complainant, will be an important factor in determining these questions, I may here state, as the result of all the evidence, that at the time of their marriage in Illinois, they were domiciled there; that when they returned to Wurtemberg, in 1856, they changed this, their domicil, of choice, to Wurtemberg, that of Roth's origin; that at the time of the institution of the nullity suit, in Schorndorf, in that kingdom, Roth still had his domicil there, whilst that of his wife had been again changed to the domicil of her origin, Alsace, and that their respective domicils thereafter remained the same until the death of Roth.

Upon these facts the first question is as to the validity of the Illinois marriage. If, considering the prohibition of the law of Wurtemberg, an absolute incapacity to marry without the royal assent attached to Roth, and, if the marriage was for that reason void here, notwithstanding our law, then one of the principal difficulties in deciding this case is removed. How then are we to regard the Illinois marriage, as valid or invalid? The answer to this question must depend upon the place by whose law such marriage is to be tested, whether Wurtemberg or Illinois. Marriage being a contract, and something more, to-wit: a change of relation or *status* (Story, Conf. Laws, §§ 112, 113), there are three theories as to the place which ought to furnish the law by which it is to be governed: the first, that is the *lex loci contractus*, the law of the place where it was solemnized. The second, that is the *lex*

domicilii, the law of the place where the parties, at the time of the marriage, were domiciled. The third, that it is the law of their domicil of origin, or of the place of their nativity, which, under the name of their "personal statute," is supposed to accompany the parties wherever they go.

A distinction has been established, however, which removes from the category of disputed cases all such as involve questions merely as to the formal requisites, as distinguished from the essentials, of marriage. It is generally conceded that the former are to be determined by the *lex loci contractus*. What shall be referred to form, and what to essentials, may be thus discriminated: When parties are not prohibited absolutely from marrying, but from marrying without certain preliminaries, as the consent of parents, such prohibitions are to be referred to the form; but an unconditional prohibition, as in case of the marriage of a deceased wife's sister by a man domiciled in England, or within the prohibited degrees, probably, in any Christian country, would be referred to the essentials; Foote, Priv. Int. Jurisp., p. 50.

It is in respect to marriage of which the essential requisites are drawn in question, that the differences expressed by these three theories arise. It is not necessary to the decision of this case that I should propound these theories at much length, or state the arguments by which they are respectively supported. These will be found: Wharton, Conf. Laws, 2d Ed., pp. 227, 228; Foote vs. Priv. Int. Jurisp., pp. 48, 52; Story, Conf. Laws, §§ 102, 112, 113–121; Dicey on Dom., 200, 201. The theory of the *lex domicilii* is generally accepted by the continental civilians, and, since Brook vs. Brook, 9 H. L., 193, by the English courts. Foote, Priv. Int. Jurisp., pp. 48, 49.

That of the "personal statute" is propounded by French and Italian and some other continental jurists, while of the American courts it is said by Judge Story, that the prevalent theory is that of the *lex loci contractus*: Conf. Laws, § 113. But a single case has arisen in our own State involving the question, and in that case the facts were such as to leave the point practically undecided. It was that of McDeed vs. McDeed 57 Ill., 545, where a marriage celebrated in Ohio, of a man under the age of eighteen, which marriage was, by the law of Ohio, made voidable by disaffirmance on arrival at the age of eighteen, and which had been disaffirmed by the hus-

band's ceasing to cohabit with his wife after that age, was pronounced by our Supreme court to be invalid, because it was so by the law of Ohio, the place where it was celebrated. But it appeared in evidence, not only that the marriage was celebrated in Ohio, but that the parties were natives of and domiciled in Ohio, though the husband, after disaffirming the marriage, had moved to Illinois, and there married again. The rule of decision adopted by our court was, therefore, no more the *lex loci contractus* than it was the *lex domicilii* or the "personal statute" of the parties, arising from their nativity in Ohio. I am thus left at liberty to apply either the law of the place of celebration, that of the domicil, or the "personal statute" of the parties, unless constrained by the authority of Judge Story, or of the cases cited by him, or, following his opinion in other States, to adopt the first.

Judge Story lays it down as a general principle, "that, between persons *sui juris*, marriage is to be decided by the law of the place where it is celebrated. If valid there, it is valid everywhere." And he adds that "This doctrine has received the most deliberate sanction of the English and American courts." Story, Conf. Laws, § 113.

The fact is, however, that the doctrine of the *lex loci* has in the latter cases, and by the more modern authorities in England, been distinctly repudiated: Brook vs. Brook, 9 H. L., 193; Foote, Priv. Int. Jurisp., pp. 48, 49.

I shall not go through the cases decided by the American courts, but, to show how little they can be relied upon to sustain the assertion of Judge Story, I will analyze those cited by him as his authority for it.

In support of that assertion, there are cited by Judge Story, nine cases. Of these, four were cases of which no question of matrimonial capacity was involved at all, but only questions of a marriage in fact, or of a marriage according to the requisite forms, matrimonial capacity being conceded, and it was properly held, as all authorities agree, that that question was to be determined by the law of the place where the marriage was, or was alleged to have been, celebrated. They are Patterson vs. Gaines, 6 How., 550; Philips vs. Gregg, 10 Watts, 158; Morgan vs. McGhee, 5 Hump., 13; State vs. Patterson, 2 Ired. (Law), 346.

Five of the nine cases, moreover, including three of the four above mentioned, were cases in which the marriage

drawn in question was celebrated in the place where the parties were at the time domiciled: West Cambridge *v.* Lexington, 1 Pick., 506; Sutton v. Ware, 10 Metc., 451, Phillips v. Gregg., 10 Watts, 158; Morgan v. McGhee, 4 Humph., 13; State v. Patterson, 2 Ired. (Law), 346.

These cases were, therefore, no more authority for the application of the *lex loci contractus* than of the *lex domicilii*, since they were here the same. There are thus left to establish the doctrine of the American courts, according to Judge Story, but three cases, and of these, two have been severely criticised and repudiated by other courts in England and America. These two are Medway v. Needham, 16 Mass., 157, and another in the same State, decided upon its authority, Putnam v. Putnam, 8 Pick., 433. For the criticism of Medway v. Needham see Brook v. Brook, 9 H. L., 193, and Kinney's case, 30 Grat., 858.

The remaining case cited by Judge Story, is Ponsford v. Johnson, 2 Blatchf., 51, the decision of an inferior federal court. Compare Commonwealth v. Lane, 118 Mass., 458.

If not definitely tied down by the authorities to accept the *lex loci contractus*, are we at liberty to adopt the theory of the "personal statute?" This theory is founded upon two principles which are not applicable to the jurisprudence of this country; first, that allegiance is perpetually due from the subject to his native country, and that consequently a matrimonial incapacity affixed to him in that country remains attached to him, as long as he lives, whether at home or abroad; and, secondly, that in determining one's capacity or incapacity, his nationality or place of nativity furnishes the rule of decision. In respect to the latter, it may be said that the principle of nationality may properly be applied to the subjects or citizens of countries whose municipal laws are co-extensive with the national territory, and not, where, as in ours, there are different laws in different States. Thus, Italy and France have matrimonial laws that govern all Italian or French subjects, but in the United States, matrimonial capacity is determined, not by federal, but by State laws, so that when it is determined that a man is a citizen of the United States, nothing is thereby settled as to his matrimonial capacity, since there is nothing in the federal laws upon that subject.

So in respect to the first principle, nothing is better set-

tled in our law than that allegiance is not perpetual, and that our courts will not recognize the consequences that flow from the contrary hypothesis. When an immigrant of foreign birth settles amongst us, we do not ask him under what incapacities he may have labored in the country where he was born, when the point in question is whether he may here contract a marriage, since we assume that he is at liberty, at will, to cast off his foreign citizenship and its burdens and limitations, and that, for the enjoyment of civil rights here, he intends to do so, until the contrary appears. Dorsey v. Dorsey, 7 Watts, 349.

If compelled to choose, then, between the three theories stated, rejecting that of the "personal statute," as opposed to our national traditions and policy, the weight of authority as well as of reason seems to lie on the side of the *lex domicilii*. Whether, were Judge Story now living, such would not also be his opinion upon the present state of the authorities, it would, perhaps, be idle to speculate, but certain it is that it was that of the editor of the 6th edition of his Conflict of Laws, the late eminent judge and legal writer, Mr. Redfield. See his comment on Brook v. Brook, 9 H. L., 193, in Confl. Laws, § 124 b.

But whether the law of the domicil, the *lex loci*, the "personal statute," be applied in any particular case, we should recognize the fact that the rule of decision must really be the *lex fori*. That is, the law for the case in hand must ever be that of the country whose tribunal is to pass upon the question, since, if the place of birth, or of the domicil of the party, or of the celebration of the marriage, be different from that of the *forum*, its law could have no extra-territorial operation, and could become the rule of decision only by its being recognized as a part of the customary law of the country in which the court is sitting. For, what Phillimore says of divorce, is equally applicable to marriage: "It seems clear, upon all sound principles of jurisprudence, that the *forum* can only administer the *lex fori*.'" IV. Int. Law, p. 327, § 499. See, to the same effect, Birtwhistle v. Vardill, 7 Cl. & Fin., 895, per Abbott & Holroyd, JJ.

Inasmuch, therefore, as the prohibition against marrying without the royal assent, embodied in the law of Wurtemberg, although it created in Roth an absolute incapacity to

marry in violation of its terms, while domiciled there, did not create such an incapacity here as to make null and void his marriage with the complainant; such marriage, as to him, was valid; since, judged by either the *lex loci contractus*, or by the *lex domicilii*, it was valid, as the parties were both domiciled and married in Illinois. So, as to the complainant—her matrimonial capacity never having been doubted—the marriage was valid, even admitting that she had no domicil in Illinois, since it was duly solemnized by pastor Hartman, according to the forms prescribed in Illinois, the place of its celebration.

The next question relates to the validity of the subsequent marriage of Roth to the defendant, Amalie; or, since no objection can be raised to it in point of form, to the validity of the decree of nullity of the previous marriage, upon which depended the capacity of Roth to contract such second marriage. For, to decide that the Illinois marriage is valid is not equivalent to deciding that the Wurtemberg marriage is void. The Illinois marriage might be valid here if drawn in question directly in our courts, and, on the principle just stated, be invalid in Wurtemberg when tested by its courts applying the law of that kingdom declaring it, if contracted without the royal assent, void. And the Illinois marriage, tried by Illinois law, and in an Illinois court, might be valid, and the decree of nullity in the Wurtemberg court be valid and effectual also to annul it, because the Illinois marriage was invalid by Wurtemberg law and in the Wurtemberg courts.

It is a general rule that all the principles applicable by private international law, to divorces, are applicable equally to decrees of nullity.

1 Bishop, Mar. & Div., § 354; 2 do. § 755; Savigny (Guthrie) § 399, p. 366; Wharton, Conf. Laws (1st Ed.) § 213; Story, Conf. Laws, § 596.

The last author asserts the rule, in substance, but with a qualification not affecting this case.

To this, however, there is one exception; it is not to be presumed in suits for nullity of marriage, as in proceedings for divorce, that the domicil of the wife is that of the husband. This follows from the nature of suits for nullity, which proceed upon the ground that the woman never was the wife of the man, her supposed husband. The decree of

nullity, will, therefore, be considered on the authorities, save as to the point of complainant's domicil, as if it had been one for a divorce *a vinculo*.

To determine the validity of the decree of nullity, we must consider:

1. The nature of a divorce, or other act, sundering the marriage relation.

2. The question of the jurisdiction of the Wurtemberg court to pronounce the decree in this case.

3. If it had jurisdiction, the effect, if any, of such decree beyond the territorial limits of Wurtemberg.

1. As to the first question: Divorce is the dissolution, or partial suspension by law, of the marriage relation. 2 Bish., M. & D., § 225; Dicey on Dom., 349-351. The dissolution is styled a divorce, *a vinculo matrimonii;* a partial suspension, a divorce *a mensa et thoro*. As there is no question here of anything but a complete separation or dissolution of the *de facto* marriage relation, reference will only be made to that. Marriage being not only a contract, but the creation of a *status*, divorce is the annulment at once of the contract and the *status*. Foote Priv. Int. Jurisp. pp. 473-475; 1 Burge, Col. & For. Laws, 618. And this principle may, without impropriety, be applied to the *status* resulting from a marriage *de facto* which a decree of nullity declares to be void. As the contract of marriage, which precedes the act of solemnization, is thereupon merged in the resulting *status*, the latter is in substance the sole remaining factor, and can, therefore, be dealt with only by the tribunals having rightful jurisdiction over *status*. Dicey on Dom., 349-351.

2. This brings us to the second question as to the jurisdiction of the Wurtemberg court to pronounce the decree of nullity. Jurisdiction may be considered as a question of law, touching the legal requisites, or as a question of fact, turning on the circumstances of its attempted assertion in the particular case. Jurisdiction, as a legal question, is power to examine into and decide the questions of law and fact involved in a cause; and to it are necessary two things: that the court should have power to consider and determine the subject-matter in hand, and that it should have all the parties to be affected by its decision before it. In other words, to pronounce a valid judgment the court must have

jurisdiction both of the subject matter and of the person. The subject matter here is divorce, and, in relation to jurisdiction, the first inquiry is, to what courts does jurisdiction to render decrees of divorce belong? It is a general principle that jurisdiction in matters of divorce depends upon the domicil of the parties to a marriage at the time of the commencement of proceedings for divorce. Hence, it is laid down by the best authorities, that the divorce courts of any country where such parties are then domiciled, have jurisdiction to dissolve their marriage, and that no court of any other country has jurisdiction to dissolve their marriage. Dicey on Domicil; Rule, 46, pp. 225-226: Wharton Confl. Laws, Secs. 224-239; (1st Ed.); Story Confl. Laws, Secs. 228-229, 230a, etc.; Savigny Priv. Int. Law (Guthrie's Ed.), Sec. 379; 2 Bishop M. & D., Sec. 137; IV. Phillimore Int. Law, Sec. 491-521; Dorsey vs. Dorsey, 7 Watts, 349; Strader v. Graham, 10 Howe, 82; Kinnier v. Kinnier, 45 N. Y., 535; Cheever v. Wilson, 9 Wal., 108; Maguire v. Maguire, 7 Dana, 181; Wilson v. Wilson, L. R., 2 P. & D., 435, 442; Shaw v. Gould, L. R., 3 H. L., 55, 85.

Accordingly, where a marriage, celebrated in Massachusetts, has been dissolved in Vermont, upon a suit by the husband for a divorce for the cause of extreme and repeated cruelty of his wife (a cause inadmissable by the laws of Massachusetts), it appearing that the parties had not at the time any permanent domicil in Vermont, but that the husband had gone there for the purpose of obtaining a divorce, the divorce was held a mere nullity, upon the ground that there was no real change of domicil. (Hanover v. Turner, 14 Mass., 227, 231.) So, where the question arose in the same State whether a decree of divorce, rendered under circumstances precisely similar—save that both parties were at the time *bona fide* domiciled in Vermont—was valid or not, it was held in the affirmative, upon the ground that the law of the actual domicil must regulate the right. Barber v. Root, 10 Mass., 265.

See, also, to the same effect: Clark v. Clark, 8 Cush., 385; Harteau v. Harteau, 14 Pick., 181; Lyon v. Lyon, 2 Gray, 269; Kinnier v. Kinnier, 45 N. Y., 535.

Asser, the latest German authority—Das Internationale Privatrecht, p. 67—approves the principle established by Barber v. Root, though he criticizes the doctrine of Sewell,

J., who wrote the opinion, as to the penal nature of decrees of divorce.

Recurring to the requisite of domicil to give jurisdiction: In some countries, our own State among them, a residence, less than that necessary to establish an actual domicil, gives the right to institute proceedings for a divorce. It is a general rule, however, that the tribunals of a country have no jurisdiction in a proceeding for divorce, wherever the offense may have occurred, if neither of the parties has an actual *bona fide* domicil within its territory. 2 Bishop, M. & D., § 144. An exception is made in favor of a wife compelled to live apart from her husband by the character of his offense, and she may, it is said, acquire a forensic domicil separate from that of her husband. Wharton Confl. Laws (2d Ed.), § 224, note 3. Cheever v. Wilson, 9 Wal., 108.

It is also sufficient that one of the parties has an actual domicil in the country where the proceeding is commenced. 2 Bishop, M. & D., § 155; IV Phil. Int. Law, § 497.

The second legal requisite to jurisdiction, relates to the presence before the court of the parties to be affected by the proceedings. It is a maxim of international jurisprudence, founded upon the most obvious principles of justness and fairness, that no judgment or decree is valid if the party against whom it is rendered did not have his day in court. The first duty, therefore, of a party suing another is to bring him before the tribunal selected to try the issue between them. This is done by some sort of notice to him, seasonably given, that application will be made, at a day and place named, to the court then and there sitting, for the desired judgment.

The details of the process or notice necessary, as well as the forms of the procedure and of the remedy, are matters of positive regulation, and form part of the *lex fori*. Story, Conf. Laws, §§ 556, 557. For parties domiciled in the country of the *forum*, a service in a special mode, not amounting to actual notice or to service of process, may found the jurisdiction. Thus, where husband and wife were domiciled in Louisiana, and the wife departed the State and took up her residence in New York, a divorce, granted to the husband in Louisiana, upon a process substituted by statute for a personal service, though the wife did not appear, was

held by the New York Court of Appeals to be valid. Hunt v. Hunt, 72 N. Y., 217.

So, where the parties were "resident" (another part of the opinion speaks of them as "domiciled") in Indiana, and the wife deserted her husband and went to Missouri; a divorce procured by him in Indiana, upon a publication of a notice in a newspaper under an order of court, pursuant to law, was pronounced valid by the Supreme court of Missouri, in a suit brought in Missouri by the divorced wife for dower in a lot of land conveyed by her husband to the defendant. Gould v. Crow, 57 Mo. 200.

Between these sorts of service, however good by special statute in a particular State, and service internationally good, there is a well recognized distinction. No service is internationally good which does not, in fact, inform the defendant of the time and place where and when judgment will be demanded against him. If it do this, the service may be good, though the defendant be a non-resident of the State. Wharton, Conf. Laws, § 236. And although no process was served upon the defendant, if he personally appear to the action, the judgment will be good; Loud v. Loud, 10 Reporter, 113; or if he submit to the jurisdiction by appearance and taking practical steps in the cause; Foote, Priv. Int. Juris. p. 70. And it is not necessary to an appearance that the party should present himself in person; it may be by his attorney, which is indeed the only proper mode for persons *sui juris*.

Now, did the facts, on which the Wurtemberg court asserted jurisdiction, conform to these principles?

Two sources of evidence as to these facts exist: one, the record of the proceedings of that court, and the other, the testimony of witnesses bearing upon it. For the present, assuming that the record of the Wurtemberg court has been sufficiently proven, and may be here considered as evidence, are its recitals sufficient to show full jurisdiction in the court? Doubtless the document varies greatly from the record in a cause in an American court of a similar jurisdiction. But it is evident that the court not only assumed to have, but had, jurisdiction of proceedings for divorce. The record shows a petition filed in a lower court; a reference by that to a higher, by which a formal order was entered, that jurisdiction be entertained by the court in question here of a suit

for the nullification of the petitioner's marriage; that both of the parties be notified of the day of the trial, which was fixed by the same order, and that they select proctors of the court to assist them thereat. It appears, also, that a summons to the defendant therein was dispatched by the court with letters rogatory addressed to the court of First Instance, at Strasburg, in Alsace, with a request that the summons might be served upon her, and returned; that such return was made, on which was endorsed an acknowledgment by such defendant, the complainant here, that she had received the summons, appointing the time and place of trial, and that she desired to be assisted at such trial by Proctor Mosthaf. At the time and place of trial appointed the record shows that Madelaine not only was represented by the Proctor Mosthaf, named by her, but that she was personally present in court. So far as to jurisdiction of the defendant, Madelaine.

Of the complainant, jurisdiction was claimed generally on account of the two-fold relation sustained by him, first as subject and citizen of Wurtemberg, and, secondly, as domiciled in Schorndorf, a village of Wurtemberg. Upon his citizenship a distinct issue appears from the decree to have been made and decided by the court: Roth claiming that he was a citizen of Wurtemberg, and had never renounced his nationality as a Wurtemberger, and his wife contending that he had become a citizen of the United States. No proof of this latter averment being made, but the contrary having, according to the decree, been by the defendant admitted at the hearing, the court found that he had never renounced his nationality, or become an American citizen. It appears, also, that he was actually served with a summons; a step that, according to our notions, was wholly unnecessary, since he was the person who presented the original petition.

Now, considering that the remedies and the forms of the proceedings for a divorce, or decree of nullity, are to be governed by the law of the *forum*, IV, Phil. Int. Law, § 449, pp. 327-8, it seems that, so far as the recitals of the decree are concerned, the court had full jurisdiction, as well of the subject-matter as of the parties; and this, whatever we may think about the domicil of Madelaine, that of Roth sufficiently founding the jurisdiction so far as the same

depended upon domicil; and whatever may have been the force of the summons served upon him or served upon her in the manner stated in compliance with the letters rogatory. Are the recitals of the decree, then, to be accepted as competent evidence, and is the decree sufficiently proven? Conceding that the first question is to be determined by the law of Illinois, there can be no doubt, I think, that the recitals must be taken as true, and the findings of the court to have been justified by the evidence. This is a collateral proceeding, and it is perfectly settled that unless upon the face of the record of a judgment it appears that the findings of the court or the recitals of the decree were not supported by the evidence, or that the assertion of jurisdiction by the court was not justified by the facts, the decree, if of a court of general jurisidiction, will be held to be a valid one, when questioned collaterally.

Saying nothing, therefore, now of the effect of the decree, its findings and recitals must be accepted as *prima facie* true, nothing appearing on the face of the record to contradict them. I am of opinion also that the decree has been sufficiently proven. Not being within the act of Congress, or covered by treaty stipulations, the decree stands on the footing of foreign judgments generally, and may be proven by an examined copy properly authenticated under the seal of the State in which it was rendered. 1 Greenl. Evid., §§ 507, 508; 2 Phil. Evid., (C. and H. notes) 417 and note; Lincoln v. Battell, 6 Wend., 482; Hill v. Packard, 5 Wend., 387, 391; Church v. Hobart, 2 Cranch, 187, 228; Maturin v. Bickford, 6 N. H., 567.

According to the same authority it may be proven by a sworn copy.

The rule is the same, when, as in this case, the document is an original paper in the hands of a person resident abroad who refuses to attach such original to his deposition, when requested so to do. It may be proven by a sworn copy, made by him or a third person, and attached to such deposition. Fisher v. Green, 95 Ill., 98.

Such a sworn copy has been made and duly authenticated by the deposition of the party making the same, and is clearly admissible in evidence.

So much for the record. Besides that, we have bearing on the question of jurisdiction, the evidence of the expert

witnesses, Lautenschlager and Schott, lawyers resident in Wurtemberg. From their testimony it appears as a fact, that the tribunal pronouncing the decree of nullity by the law of Wurtemberg, had general jurisdiction of the subject of divorces and proceedings for nullification of marriage; that the steps taken to bring the parties before the court were by such law sufficient to give the court jurisdiction of them, and that the decree was valid and binding in the kingdom where rendered, in all courts and places. There can be no doubt that this evidence is competent, and upon this question, decisive.

Certainly, therefore, so far as the kingdom of Wurtemberg is concerned, the decree fixed definitely the *status* of Roth and the complainant. It remains to inquire, what was its effect in Illinois? The effect of a decree or judgment may be considered with respect, first, to its conclusiveness as evidence. and, secondly, to the consequence which it entails upon the *status* or the rights of the parties to it. As to the first point, already partly considered, it is a general rule that the judgment of a foreign court having jurisdiction of the subject-matter, and of the parties, is conclusive everywhere. 2 Am. Lead. Cases, 615.

It is examinable for error in law only by a court having a right to entertain appeals from the court rendering it. Foote Priv. Int. Jurisp., 450.

Judgments rendered in the United States are, by the federal statute of May 26, 1790, made as conclusive in other States of the Union as domestic judgments. There is, nevertheless, some contrariety of practice both here and abroad, when it is alleged that the judgment, tested by international principles, is unjust by reason of fraud in procuring it, or of want of complete jurisdiction in the court rendering it. In some of our States, if the judgment contains recitals sufficient to sustain the jurisdiction, no averment is allowed to contradict them. In others, such averment is permitted, or permitted if it be of facts tending to impeach the judgment, but not directly contradicting it by flying in the face of its estoppels. 2 Am. Lead. Cases, 611-614; Freeman Judgm'ts, § 563.

In our own State the stricter rule has been expressly sanctioned by our Supreme court in numerous cases. Chipps v. Yancey, Breese 19; Rust v. Frothingham, Ib. 331; Welch v.

Sykes, 3 Gilm., 197; Westcott v. Brown, 13 Ill., 83; Zepp v. Hagar, 70 Ill. 223.

And compare Bimeler v. Dawson, 4 Scam., 536; Goddard v. Gray, L. R. 6 Q. B., 139, 150.

In England this rule as to foreign judgments is finally settled to be that they are conclusive, unless it appear that the court had not jurisdiction to render them, or unless they were obtained by fraud Foote Priv. Int. Jurisp. 463-467.

In the United States the tendency is, it is believed, to adopt the rules as to foreign judgments, thus established in England; and the Illinois Supreme court, in a late case, Baker v. Palmer, 83 Ill., 568, expressly sanctioned it where the conclusiveness of a Canadian judgment was drawn in question.

Decrees of divorce pronounced by foreign tribunals having full jurisdiction of the subject-matter, and of the parties domiciled in the country of the *forum*, being in the nature of decrees *in rem*, are generally regarded as conclusive evidence of a change of the marriage *status*. Story Conf. Laws, §§ 201, 202; Dicey on Dom. 233-240, 349-351; Freeman, Judgm'ts, §§ 579, 610; IV, Phil. Int. Law, § 953; 2 Bishop Mar. & Div., § 755.

These principles, however, do not determine the real question here. What consequences follow such a decree in respect to *status* in other countries? Does the changed *status* adhere to the parties when beyond the jurisdiction of the court which rendered the decree? Of the three theories of divorce described by Dicey (on Dom., 349-351), the contract theory, which regards it as a remedy for a breach of contract; the penal theory, which regards it as a penalty for a crime or misdemeanor; and the *status* theory, which regards it as a dissolution of a *status* or relation; accepting the latter as the most rational and satisfactory, it is clear that the effect of a decree of divorce, rendered by a competent court of the matrimonial domicil, is an absolute dissolution of the marriage *status* throughout the world.

Mr. Phillimore, vindicating this theory, says of foreigners, who come into a State with a particular *status*, resulting from a decree of divorce rendered in the State of their foreign domicil, "that the only ground upon which this *status* could be refused recognition would be, that it was contrary to the public policy or morality of the new State;" and he adds,

"But it seems clear that the residence in that State of *two* foreigners, as single persons, is not a case of this description. What the former *status* of these parties was, is a matter of private history, in no way affecting the State in which they happen to be now resident:" IV Phil. Int. Law, pp. 323, 328; Harvey v. Farnie, L. R. 5 P. D. 153.

And, in truth, if Mr. Phillimore's suggestion be well founded, the objection could be not so much to the assumption of new relations by the divorced parties, inconsistent with it.

Apply the principle thus stated to the case now in question. Had Roth and the complainant, after the dissolution of their *de facto* marriage in Wurtemberg, removed to Illinois and resided here as single persons, no State policy or rule of morality would have been violated, and unquestionably the decree would have been recognized as valid. If any objection could have arisen to that decree, it must have been on the ground just stated as to new relations, or on grounds involved in the following question, also discussed by Phillimore. That question is: "Ought a State, the law of which permits divorce upon certain grounds, to recognize a foreign divorce, which had been obtained upon other grounds, by its own subjects?"

Now, this question does not describe the facts in the case before the court, only because the parties are not and never were American subjects or citizens. As to this question the learned author says: "The answer must depend upon the nature of the theory which the State applies to foreign divorces. A State which holds that the incapacity to be divorced, except for reasons admitted by the original matrimonial domicil, was of the nature of a *personal statute*, ought certainly to hold a foreign divorce, on any other grounds than those admitted by the original matrimonial domicil, to be null and void." To this it is enough to say, that the doctrine of the *personal statute* is accepted by no American court or authority, in the sense attended, if an absolute incapacity created by foreign law, and by virtue thereof attending the person wherever he goes. Phillimore continues: "So, a State which holds that a divorce is a matter affecting public order and morality is not bound to recognize a foreign divorce between its subjects founded upon reasons which it had not sanctioned by its own juris-

prudence, whether these subjects had or had not been, at the time of obtaining the foreign divorce, domiciled in the State which granted it."

Two observations in respect to this assertion, occur to me: It supposes, as before stated, that the divorce abroad had been obtained by subjects of the State called on to recognize it, and, second, in Illinois, divorces have never been held to be a matter affecting public order or morality in any such sense as that recognition should be refused to them, when decreed abroad, for causes not admitted by our law, between citizens of the State, domiciled in the place where the decrees were rendered. On the contrary, such divorces, were the question fairly to arise, as it never, perhaps, has done, could, according to the weight of American authority, be decided to be valid and effectual.

In McDeed v. McDeed, 57 Ill., 545, a case already cited on another point, the *principle* seems to have received the indirect assent of our Supreme court. That was a case of the dissolution of a marriage contracted in Ohio by a man under eighteen, by disaffirmance on arriving at eighteen, in pursuance of a law of Ohio. The husband then moved to Illinois, married again, and died a domiciled citizen of Illinois. In a suit by a child of the first wife, in Illinois, to recover the property of the husband as his heir, it was held that the dissolution of the marriage by disaffirmance under Ohio law was valid, though, at the time, the laws of Illinois permitted marriages under the age of eighteen years. The ground of the decision was that the parties were, at the time of the dissolution of the marriage, domiciled in Ohio.

Mr. Phillimore concludes his discussion upon this question as follows: "On the other hand, a State which does *not* hold the doctrine of the *personal statute*, above mentioned, and which does *not* hold that divorce is such a question of public order and morality that no change of domicil can give a foreign State jurisdiction over it, ought to recognize the sentence of a foreign State over persons at the time domiciled within its territory, though she does not sanction the grounds of that divorce, by her domestic law." IV, Phil. Int. Law, pp. 324, 335, 336.

If such be the rule as to the divorce of the subjects or citizens of a State domiciled abroad, how much more should it be the rule as to persons not citizens, but merely domiciled

in this State, when married, and who were divorced in the State of which both parties, or at least the husband, was a subject and citizen, and in which they acquired a domicil subsequently to their marriage here.

So far of foreign divorces as affecting a *status*, and as entitled to recognition beyond the limits of the country where they were rendered. Before inquiring into their effect upon property rights in other countries, let us consider a few decided cases, bearing on the foregoing principles. In Lolly's Case, 1 Russ. & Ry. cases, 239, an English subject, married and domiciled in England, went to Scotland, and there, without having acquired a new domicil, procured a divorce *a vinculo*, from his wife. Returning to England and marrying again, he was found guilty by the twelve judges, on an indictment for bigamy, on the ground that he was not domiciled in Scotland, and therefore his divorce was invalid.

See, also, to the same effect, Dolphin v. Robins, 1 Sw. & Tr., 37; S. C. 7 H. L., 390; Dicey, Dom., pp. 351, 355.

In Warrender v. Warrender, 2 Cl. & Fin., 523, S. C. 9 Bligh., 89, the same rule was applied with a contrary result. A Scotch gentleman, domiciled in Scotland, married in London an English woman, who had been only twice temporarily in Scotland, after the marriage. The husband procured a divorce in Scotland, where he principally lived, from his wife, who at the time resided in France. Lord Brougham sustained the divorce in England, upon the ground that the parties were domiciled in Scotland.

See also, Conway v. Beasley, 3 Hagg, Eccl. R. 642; Harvey v. Farnie, L. R., 5 P. D. 153; Macarthy v. Decaix, 2 Russ. & Ry. 614; and the remarks upon it of Phillimore, IV Int. Law, §§ 515, 519, pp. 341, 345. Compare Dicey Dom., pp. 351–355.

These cases represent the present state of English law upon the question.

Of American cases, one of the strongest is Hunt v. Hunt, 72 N. Y., 217. In that case, a man and wife being domiciled in Louisiana, the wife left him and took up her residence in New York. The husband then procured, in a Louisiana court, upon a service not actual, but substituted by the law of the *forum*, a divorce from his wife, and married again. To a bill filed in New York, against the husband for a divorce, on the ground of adultery, because of the latter marriage, the prior

divorce in Louisiana was pleaded, and it was held to be a good defense.

Now, barring the circumstances that in our case the judgment was that of a foreign tribunal, and in the New York case it was that of another State, the facts are similar, but because of another circumstance, that in the Wurtemberg suit the defendant personally appeared, the decree therein is far more consonant with international principles than that pronounced by the New York court. So in Gould v. Crow, 57 Mo., 200, where the facts were substantially the same, the service upon the defendant having been by publication of a notice in a newspaper, the Supreme court of Missouri ruled that while the decree of divorce, which was rendered in Indiana, "had no extra territorial effect *in personam*, it had the effect as a judgment *in rem* to dissolve the *res*, which was the *status* of marriage, and that the dissolution operated everywhere."

To the same effect is Barber v. Root, 10 Mass., 260, and Kinnier v. Kinnier, 45 N. Y., 535.

The last is a remarkable case, having a significant bearing upon the one before me. The facts were, that a former husband of the defendant, a resident of Massachusetts, had gone to Illinois expressly to procure a divorce from her, and, by her appearance in the suit and collusion with him, had been able to secure a decree. Subsequently the divorced wife returned to the East and married the present plaintiff in New York. *Held*, in an action brought by him (the second husband) to dissolve this marriage with her, on the ground of her former marriage being still in force, that a complaint stating these facts was insufficient, and a demurrer to it was sustained; and it was held that the Illinois court had jurisdiction of the subject-matter (to decree divorces according to the laws of the State), every State having the right to determine for itself the grounds upon which it will dissolve the marriage relation of those within its jurisdiction, and that the court had jurisdiction of the parties by a voluntary appearance of the defendant.

Applying these principles to the present case: Had the complainant, after the dissolution of her marriage in Wurtemberg, come to Illinois and married again, and had her second husband sought from her here, a divorce on the ground that her former marriage was still in force, the facts would have been the same as in the case last cited; but is there any reason

to suppose our courts would have held differently from the court of New York as to the validity of the decree of dissolution, and that all the more, because in the suit in Wurtemberg there is no pretense that there was fraud or collusion on either side, and Roth was a subject and citizen of Wurtemberg, domiciled there at the time the decree was rendered?

There is general agreement among the authorities as to the effect of a foreign divorce upon the property rights of the parties. Phillimore says:

"It seems clear that States which recognize the validity of a foreign divorce must recognize the incidents to it, such especially as its effects upon personal and real property. The effect upon the former ought to be the same with that on the personal property in the State which decreed the divorce. The effect upon the latter must depend upon the *lex rei sitae*, according to the prevalent doctrine as to real property. If the *lex rei sitae* visit divorce with certain consequences, and recognizes a foreign divorce, it ought to ascribe the same effects to it as to a divorce by the domestic law." IV. Phil. Int. Law, § 508, p. 336.

Story announces the same rule, and adds: "If a dissolution of the marriage would there" (the place of the *situs* of real property) "be consequent upon such a divorce, and would there extinguish the right of dower, according to such local law, then the like effects would be attributed to the foreign divorce, which worked a like dissolution of the marriage." Story Conf. Laws, § 230 e, citing Warrender v. Warrender, 9 Bligh., 127. See also Savigny, Priv. Int. Law (Guthrie), § 362, pp. 104–108.

How far our courts have gone in applying the principle affirmed by Phillimore and Story may be seen from a few decisions. In Gould v. Crow, 57 Mo., 200, when, as we have just seen, the Supreme court of Missouri pronounced an Indiana divorce procured upon a notice by publication effectual to dissolve the *res*, the marriage *status*, it went further and declared that "the dissolution of the *status* operated everywhere, and that all rights dependent upon it ceased not only in the State where it had been rendered, but in all other dominions."

So, in the case of Barber v. Root, 10 Mass., 260, where the Supreme court of Massachusetts passed upon a divorce rendered in Vermont, between parties domiciled there, though the contract of marriage had been entered into in Massachu-

setts, for a cause not recognized as a ground for divorce in Massachusetts, it was held that the divorce, having been pronounced by a competent court, having jurisdiction both of the person and the subject-matter, dissolved the marriage relation and had in Massachusetts the effect there given to such a dissolution, namely, a divestiture of the rights of the offending party in the lands of the other in Massachusetts.

Considering, now, that by the law of Illinois a party for whose fault a divorce has been granted, loses, by forfeiture, "dower and any estate granted by the laws of this State in the real or personal estate of the other party," and that, by the same law, "where the marriage is void from the beginning," no dower or other interest in each other's property is allowed, it seems clearly to follow that the decree of nullity cut off all apparant right of the complainant, as *de facto* the wife of Roth, to his property in Illinois. See Ch. 41, Sec. 14, Ill. Rev. Stat., title, Dower.

Two objections raised to the validity of this conclusion may be briefly considered; one, that the decree of nullity was void, as based upon a statute of Wurtemberg, which at the date of the decree, had been repealed—the statute of 1808; the other, that to give to that divorce the force indicated above, would contravene the policy of this State in respect to divorces. As to the supposed effect of the repeal of the statute, no authority has been cited, and I have been able to find but one (Savigny). Savigny is of opinion that when an alteration is made in the law of divorce, by a new law or by a repeal of an old one, the marriage must be judged by the new or modified, and not by the old law. He admits that he bases this view, not upon "juridical reasons, but on moral (partly moral and religious) grounds," and affirms that "because laws as to divorce have moral grounds and aims, they are therefore of a coercitive nature, and so belong to the laws as to the existence of marriage." Priv. Int. Law, § 399, p. 365.

Sitting as a court of law, it is not perceived what power I have to determine questions of property upon reasons not juridical, but partly moral and partly religious, finding no place in our statutes or in the decisions of our courts. This view, moreover, seems not to have been accepted by the tribunals of Wurtemberg, to which, upon this question of their own law, great deference ought to be paid. The ex-

perts examined by the defendant, Amalie, agree in declaring that the repeal of the law of 1808 had no effect whatever upon the marriage contracted before it took place, but that such marriage was, by Wurtemberg law, to be governed, in all respects, by the statutes in force when it was celebrated. Moreover, the effect of the law of 1808, which had been repealed by the law of 1872, was one of the issues heard and determined by the Wurtemberg court in that case, and the decree found the law of 1808 was applicable and governed the decision. This was an impeachable certificate of the law of that kingdom: Wharton Conf. Law, § 801.

In respect to the policy of Illinois, little more need be said, than that in the absence of an express declaration of that policy by our legislature, or by our highest courts, that policy which is clearly to be inferred from the whole course as well of our legislation, as of judicial decision in the State, ought to set the question at rest. The policy so inferable is one of *freedom of marriage and freedom of divorce*, both of citizens and of foreigners, and when the latter have been married here, whether to citizens or to foreigners, it is not the policy of this State to forbid them to sunder lawfully their relations with us or with each other, or to form lawfully new relations in the countries to which they may emigrate, and in which they may become domiciled. We do not register them, unless they become naturalized citizens of the United States, nor, when they are divorced abroad, do we trouble ourselves about their future marital relations, or in case of their death disturb them or their successors in the enjoyment of such property as they may have left here, save as we justly may, to protect their creditors.

Assuming that the decree of nullity was valid, and had the effect stated, the claims of the complainant fall to the ground with their basis, the supposed marriage with Roth. This is not denied by her counsel; but it is averred that the decree is invalid, and, on that hypothesis, it is claimed that Madelaine is still entitled, notwithstanding the releases and the deed to Roth, and to Amalie, of all interest in the property of Roth, to a widow's share of such property, on the ground that those releases were executed by her in ignorance of her rights, upon false representations, and under undue influence.

To determine the question of the binding effect of these

instruments on the assumption that the decree was and is invalid, the circumstances under which they were executed must be considered. At the time the first release of September 9th, 1873, was executed, the parties had been five months separated by a decree of nullity pronounced by a court which the parties, doubtless, considered a competent one, and they probably agreed that the effect of that decree was to cut off all the rights of complainant in Roth's property. Certainly there is no evidence that, at that time, either of them entertained a doubt of the perfect validity of that decree, whatever the complainant may have thought of its abstract rightfulness. If so, Madelaine must have supposed her late husband, in securing the release from her, to be acting merely out of abundant caution, and to be making to her substantially a gift of the $8,000. If, on the contrary, she had a suspicion that her defense to the nullity suit ought to have been allowed, and that the decree therein was either invalid or irregular as well as unjust, and, if so believing, she consented to waive her defense, or her right of appeal in consideration of the $8,000 paid her, then that payment must be taken to have been made upon a compromise of a disputed claim, and it is perfectly settled that such a compromise would not be disturbed, though it was afterward made apparent that her right was incontestible, and that of Roth was without foundation. However this may be, when the complainant visited Schorndorf after the death of Roth, there is reason to believe that she went there not only to see if her late husband had not left her something more, but to make the best terms she could with Roth's widow for an abandonment of supposed claims of her own upon his estate.

Thus during a visit of over a week she either herself opened or acceded to proposals for opening negotiations with Amalie for a further allowance from her husband's estate, and she actually received from Amalie 10,000 marks, and thereupon, in consideration thereof, executed the release and settlement of September 26th, 1876. By this instrument, after reciting the proceedings at Ellwangen, by which her marriage had been declared null, she renounced, as she expressed it, "knowingly and under mature consideration, all and every claim which she might be entitled to, according to the existing laws of the city of Chicago, of the State of Illi-

nois, and also according to the laws of the United States of North America, upon her deceased husband, John George Roth, or upon the estate left by, him, both in the United States of North America, as also in Germany, whether as heirs of the deceased husband, or what might be derived in general from the marriage contracted with him." It was then stated that, in consideration of her renunciation of her claims against her deceased husband, both in America and in Germany, in addition to eight thousand dollars paid her September 9th, 1873, she was now to receive, by the first day of July following, the sum of 10,000 marks, and, in case of delay, interest thereon at 5 per cent. She then revoked, "explicitly and knowingly, the power of attorney given to her brothers," Ludwig and George Moser, "residing near Chicago, or to any person to lay claim for her to the estate left by her deceased husband." This last clause is extremely significant, since it demonstrates that, before its execution she had conceived herself to be entitled to a portion of such estate, and had taken steps to assert her supposed rights. The release was duly executed, witnessed and acknowledged at Schorndorf, before Gaupp, the royal Wurtemberg court notary.

Without further specification, then, I find that this release was executed by the complainant with full knowledge of her rights and of all essential facts. I also find that it was executed without fraud, misrepresentation, or under influence on the part of Amalie, and that, coupled with that executed to her husband after the decree of nullity, it bars in equity all right on her part in the property of her husband, irrespective of the validity or invalidity of the decree of nullity. In addition to this, is the deed of October 3d following, by which, in a more formal manner, the complainant, upon the same considerations and upon a conditional agreement to pay her more in case the Chicago property should be well sold, conveyed to Amalie all her interest in her husband's property.

As to the rights of the other defendants, the case stands differently. By virtue simply of the marriage with the deceased Roth, the defendant Amalie acquired at his death, according to Illinois law, all his personal and one-half his real estate, after payment of all just debts. The remaining half of his real estate went to Roth's brothers and sisters

and their descendants, unless interrupted by the operation of some transfer made by Roth during his lifetime.

Such a transfer, it is claimed on Amalie's behalf, was effected by the instrument styled "a marriage and inheritance contract," an instrument exhibiting many of the features of a post-nuptial settlement made between Roth and Amalie some four months after their marriage. This instrument was formally executed and acknowledged by the parties to it, according to the law of Wurtemberg, and has been duly authenticated as evidence in this case. From the testimony of the expert witnesses, Lautenschlager and Schott, this contract was valid and effectual by the law of the place where executed, for the purposes set forth in it. Whether it has any and what force and effect in Illinois, as touching the real property of Roth here situate, is the question to be determined. The tenor of the instrument was that the parties thereby settled by agreement "their property relations during their marriage, and the future succession thereof." The husband contributed to the marriage his property in Germany and America, without an attempt at valuation; the wife contributed dowry from her mother, in cash, 2,500 florins; also, chattels appraised at 1,000 florins.

There was to exist between them general community of estate, extending to the estate of both, present and future; both husband and wife were to have equal claims on the common property; and all debts, known or unknown, previous or subsequent to the marriage, were to be considered as common debts, with the right to the husband of controlling the property, and of disposing of or mortgaging the same without interference on the part of the wife. Upon the death of either, the community was to be continued with the children, if any, until his or her death, or re-marriage. Upon the death of the survivor, the whole estate was to be divided among the children, according to the Wurtemberg law of intestacy, as the estate of both parents. Should either husband or wife die childless, the community of estate was to cease, and the entire estate, until then held in common, to fall to the survivor as his sole property, excluding all claims of inheritance by relatives of the ascending line, as well as by collateral relatives of the deceased. The survivor, however, within a year of the death of the other, was to pay to the relatives of the deceased without interest, *and without security*,

a so-called revisionary interest; that is to say, the husband, if he survived, was to pay to the wife's relatives the entire contribution of his wife, of 3,500 florins, and its acquisitions during marriage.

The wife, if she survived, was to pay to her husband's relatives, naming those then living, 80,000 florins, to be divided, *per stirpes*. It was finally provided that the payment of the husband's relatives should be proportionately reduced in case 80,000 florins should turn out to be more than one-half the whole estate.

The rights dependent on this contract are to be determined by the law of the place where it was executed, the kingdom of Wurtemberg. Decouche v. Savetier, 3 Johns. Ch., 190.

What construction that law places upon a contract of such a nature has been expressly declared by the expert witnesses before named. After stating that the marriage and inheritance contract was executed in due form so as to become operative for the purposes therein declared, according to that law, those witnesses affirm that, assuming the death of Roth without conveying the property therein described and referred to, Amalie, his widow, would have a right to the whole fortune left by him, subject to the payment of eighty thousand florins to his relatives, as therein stipulated. In this judgment, they are supported by American authorities, including our own Supreme court, passing upon contracts in the main similar, and like this, executed abroad. Decouche v. Savetier, 3 Johns. Ch., 190; Besse v. Pellochoux, 73 Ill., 285; Story, Confl. Laws, §§ 143, 184, 185.

The tenor of these authorities is, that where there is an express ante-nuptial contract, it will generally be admitted to govern all the property of the parties, not only in the matrimonial domicil, but in every other place, unless it contravenes some law or principle of public policy of the country where it is sought to be enforced. It will act directly on movable property everywhere, but as to immovable property in a foreign territory, it will, at most, only confer a right of action, to be enforced according to the jurisprudence, *rei sitae*.

Now, first, a post-nuptial contract, when there are no creditors, and where the consideration is sufficient, is as valid

as an ante-nuptial contract. Here there are no creditors, and the consideration is abundant.

Secondly, there is no law or policy of this State contravened by the contract in question; on the contrary, it falls in with rules of property established by statute law and by judicial decisions. It is settled that the husband may vest his entire estate in his wife, to the exclusion of his heirs, who have no rights against his express wish, legally declared. Moritz v. Hoffman, 35 Ill., 553; Sweeney v. Damron, 47 Ill., 457; Harris v. Harris, 54 Ill., 74; Bridgeford v. Riddle, 55 Ill., 263; Lincoln vs. McLaughlin, 74 Ill., 68; Yazel v. Palmer, 81 Ill., 82.

Heirs expectant have no interest in the estate of the party from whom they expect to inherit, nor is the owner under any obligation to leave his estate to them. Rutherford v. Morris, 77 Ill., 412; Sexton v. Wheaton, 1 Am. Lead. Cas., 17, and notes.

Thirdly, conceding that our act of 1874 has no bearing upon this contract, so as to make it operative to convey the legal title, it conveys a title which will be recognized and enforced in equity as against Roth's heirs; Dale v. Lincoln, 62 Ill., 22; Livingston v. Livingston, 2 Johns, Ch., 537; Hunt v. Johnson, 44 N. Y., 27; Wallingford v. Allen, 10 Pet., 583; Jones v. Obenstein, 10 Grat., 259.

The defendants, other than Amalie, therefore, were completely cut off by the marriage and inheritance contract, as heirs, and had, after its execution, rights in Roth's estate only as legatees under its provisions, but by their conduct after the death of Roth, and their dealings with his widow, they have estopped themselves from claiming as heirs, even were the effect of the contract such as to permit it. It appears from the evidence that Roth was much crippled by the Chicago fire, in respect to his ready means, and that after his death, his widow, finding it impossible to pay within the year limited the legacies of Roth's relatives, made known the difficulty to the latter, and stated to them that to make the full payment it would be necessary to sell a portion or all of the Chicago property. To enable her to do this, she induced them to make to her or to Albert Staehle, her agent, quit-claim deeds of such property. In the meantime, both before and after the execution of such deeds, she made to them considerable payments on account of their respective

legacies, in some cases amounting to over two thousand, and, in all cases, to many hundred dollars. It cannot be justly pretended that they did not know as much in regard to their rights, if any they had in Roth's property, independently of the marriage and inheritance contract, as Amalie did, or as anybody else did, at the time they received these payments and executed their deeds; and there is no evidence worthy of the least attention that they were deceived or misled by Amalie, or her brother, or other agents in Chicago, in regard to the property or their rights therein. If ever there was, therefore, a righteous estoppel, there is such an estoppel upon Roth's heirs here, supposing even that the marriage and inheritance contract was invalid; for, knowing their rights, they consented to part with them, or to compromise them for a price, of which they received a large share. To permit them now to repudiate their deeds and to demand their proportions as heirs would be to sanction the grossest injustice to Amalie, and the most glaring inconsistency in them.

I deem it proper further to say, that to sustain the charges made by the complainant, and seconded by Amalie's co-defendants, of immorality on the part of the latter in her relations with Roth, prior to her marriage to him, there is no evidence deserving of the slightest weight. Certainly Amalie stands before the court as spotless in reputation as the complainant herself, in respect to the relations sustained by them severally, while unmarried, to the man who was afterward the husband of each.

To the conclusion thus forced upon me, objections have been raised, but one of which will be considered. The post-nuptial settlement required Amalie, if the survivor, to pay the 80,000 florins to the relatives of Roth, within one year from the time she becomes sole owner by the death of Roth. Since she did not do so, it is claimed that she forfeited her rights as against them, or rather that they were, as the result of her default, reinstated in their rights as heirs of her husband, and that they had a lien on Roth's estate in Amalie's hands, for their respective shares thereof. To this it is answered, that the construction of this contract is to be determined by the laws of Wurtemberg, where it was executed, and that by the law of that country, as deposed to by foreign experts, the effect of the failure to pay within the year was not to forfeit the contract, but to create an obligation on the

part of Amalie, without security and without interest, enforceable by the ordinary proceeding in that kingdom for collecting debts; and that such obligation created no lien upon the estate.

Decree will go accordingly.

When the case reached the Supreme court, it declined to draw fine distinctions, and cut the Gordian knot by resting their decision upon two simple propositions. The decision of Judge Jameson, however, is of intense interest to the profession, or even to a layman, both for the delicacy and romance of the questions involved, as well as for the breadth and scope of the research made, and the ability displayed by the learned judge in deciding the case. It is really an epitome of the law of foreign marriage and foreign divorce, and is one of the most learned decisions I ever read. Judge Jameson's opinion attracted great attention. It appeared in many law journals and was strongly supported, and disparaged, with equal emphasis. The most pronounced criticism *contra*, which fell under my notice, appeared in Edinburg, and which I insert entire; but it does not become the reviewer to call Judge Jameson's opinion "*nonsense*." That transcends the bounds of decent criticism, especially when applied to a decision of John A. Jameson.

CRITICISM OF A JUDICIAL OPINION

MADE BY "THE JOURNAL OF JURISPRUDENCE, AND SCOTTISH LAW MAGAZINE," EDINBURG. NO. 33 OF VOL. 26, MARCH, 1882.

"From Illinois, there has been sent to us a report of the judgment pronounced by the Hon. John Jameson, in the Superior court of Cook county in that State, in the case of *Madelaine Roth v. Fredericke Ehman et al.*, a case regarding the validity of a marriage and the authority to be given to the decree of a foreign court annulling the marriage. The judgment is long and elaborate, and the views of the learned judge are supported by some hundred and twenty references to authorities, and legal treatises. We confess to have a predisposition to doubt the soundness of a decision or an argument which requires to be so elaborately fortified, and a perusal of the present judgment has not tended to diminish this predisposition. The essential circumstances of the case,

so far as regards the question of jurisdiction, or rather the question by what law the validity of the marriage was to be determined, are as follows: A man, Roth, a subject of the King of Wurtemberg, emigrated to Chicago, where, during a business life of about a quarter of a century, he acquired a large property, both heritable and movable. Toward the end of this period he married in Chicago, Madelaine Moser, the complainant in the action, a native of Alsace. Some years afterward Roth and his wife left America, and took up their abode in Schorndorf, in Wurtemberg. In 1870, some years after their settling down there, Roth raised an action of nullity of marriage against the wife, who, on the institution of the proceedings, went to reside in Alsace: and in 1873 the decree was granted. The ground of action and the decree was, that Roth had not complied with a law of Wurtemberg which declared void all marriages of subjects of that kingdom contracted abroad without the license of the king. Shortly after Roth, of course, married another woman, Amalie Staehle, one of the defendants of the Illinois action. On his death, without issue of either marriage, the first wife raised this action under consideration, urging that the Wurtemberg decree of nullity of marriage was of no effect as regarding the property in Illinois at least, and claiming as relict, her share in the succession of that property, real and personal. As regards the domicil of Roth and his first wife, the learned judge states: 'As the result of all the evidence, that at the time of their marriage in Illinois they were domiciled there; that when they returned to Wurtemberg, they changed this their domicil of choice, to Wurtemberg, that of Roth's origin; that at the time of the institution of the nullity suit in Schorndorf in that kingdom, Roth still had his domicil there, whilst that of his wife had been again changed to the domicil of her origin, Alsace, and that their respective domicils thereafter remained the same until the death of Roth.' 'Few causes,' he further says, 'I imagine, have ever arisen involving more of the complicated and interesting problems of private international law than this. By what law shall the validity of the two marriages of the intestate Roth be determined? By what, that of the decree of nullity of his marriage with the complainant? If that decree was valid by the law of Wurtemberg, how is it to be regarded by the courts of Illinois?'

"The learned judge decided that the decree of nullity of the first marriage being the decision of a competent Wurtemberg court, must be recognized everywhere else, and in Illinois in particular; that the second marriage must, consequently, be recognized as the valid marriage, and therefore that the complainant Madelaine, the first wife, was not entitled to any share of the succession of the deceased, even of the real estate situated in Illinois, where the marriage was celebrated. The method of reasoning by which this result is arrived at is singular. The question as to the validity or invalidity of the Illinois marriage depends, says the learned judge, 'upon the place by whose law such marriage is to be tested, whether Wurtemberg or Illinois. . . . There are three theories as to the place which ought to furnish the law by which marriage is to be governed:" first, that it is the *lex loci contractus*; second, that it is the *lex domicilii*; third, that it is the law of the domicil of origin, "which, under the name of 'their personal statute,' is supposed to accompany the parties wherever they go." But "a distinction has been established which removes from the category of disputed cases all such as involve questions merely as to the formal requisites as distinguished from the essentials of marriage. It is generally conceded that the former are to be determined by the *lex loci contractus*. What is to be referred to form and what to essentials may be thus discriminated: When the parties are not prohibited absolutely from marrying, but from marrying without certain preliminaries, as the consent of parents, such prohibitions are to be referred to the form." Now if there ever was a case in this world which unmistakably fell within this category, and in which therefore the law to be applied was the *lex loci contractus* (which happens to be the law of Illinois), it is the present case. If the consent of parents is a preliminary which is to be referred to the "form," surely the consent of the King of Wurtemberg is so too.

"Further, the learned judge remarks (p. 11) "that of three theories stated, he must reject "that of the 'personal statute' as opposed to our national traditions and policy." There being only two remaining theories, that of the *lex loci contractus* and that of the *lex domicilii*, and the law of Illinois being both, one would have thought that there could be no difficulty in applying the law of Illinois, accord-

ing to which the first marriage was good—nay, that there was an insuperable difficulty against not applying it.

"But it is further said (p. 12), that "whether the law of the domicil, the *lex loci*, or the 'personal statute,' be applied in any particular case, we should recognize the fact that the rule of decision must be the *lex fori*. That is, the law for the case in hand must ever be that of the country whose tribunal is to pass upon the question." Surely, then, in a case before an Illinois court, the law to be applied is the law of Illinois. One would have thought that the question was conclusively settled. According to the learned judge's own statement, there are only three laws which can possibly be applied after the personal statute theory is rejected—the *lex loci contractus*, the *lex domicilii* and the *lex fori*. The law of Illinois is all the three, and the first marriage is good by the law of Illinois.

"Then it is said, in this remarkable judgment, the next question relates to the validity of the second marriage, or, since no objection can be raised to it in point of form, to the validity of the decree of nullity of the previous marriage, upon which depended the capacity of Roth to contract such second marriage. One would have thought that the first marriage being valid according to the law of Illinois, which is the *lex loci contractus*, the *lex domicilii*, and the *lex fori*, by one or other of which the question, it is stated, has to be decided, there could be no question in an Illinois court about the effect to be given to the decree of nullity of marriage or as to the validity of the second marriage, bigamy being, according to the laws of every Christian nation, not an institution, but a crime. But the judgment goes on to say: 'To decide that the Illinois marriage is valid is not equivalent to deciding that the Wurtemberg marriage is void. The Illinois marriage might be valid here, if drawn in question directly in our courts, and on the principle just stated be invalid in Wurtemberg, when tested by its courts applying the law of that kingdom, declaring it, if contracted without the royal assent, void. And the Illinois marriage, tried by Illinois law, and in an Illinois court, might be valid, and the decree of nullity in the Wurtemberg court be valid and effectual also to annul it, because the Illinois marriage was invalid by Wurtemberg law and in Wurtemberg courts.' Surely no such nonsense was ever talked out of Bedlam. For an

Illinois court to decide that the Illinois marriage is valid is equivalent to deciding that, so far as concerns the Illinois court and the matters over which it has jurisdiction, which of course includes the right of succession to the heritable property situated in Illinois, which is to be determined the *lex rei sitae*, the second, the Wurtemberg marriage is invalid. For an Illinois court to decide otherwise is to decide that according to the law of Illinois the first marriage is both valid and invalid.

"It is not difficult to see how the learned judge diverged into error. He proceeds to say: 'It is a general rule that all the principles applicable by private international law to divorces are applicable equally to decrees of nullity.' There is no exception, he says, in suit for nullity of marriage; it is not to be presumed, as in suits for divorce, that the domicil of the wife is that of the husband. 'The decree of nullity of the Wurtemberg court will, therefore, be considered on the authority, save as to the point of complainer's domicil, as if it had been one for divorce *a vinculo*.' Here is the origin of the fallacy. Here we find 'the little rift within the lute.' A decree of nullity of marriage cannot be considered as a decree of divorce in regard to the question whether the decree of a foreign court is to be recognized simply because it is not a decree of divorce, but differs from it *toto caelo*. A decree of divorce dissolves the marriage, a decree of nullity of marriage declares that the marriage never existed. The courts of a country in which a marriage is celebrated, and according to the law of which the marriage is good, may, as our Scottish courts do, recognize a decree of divorce dissolving that marriage, granted by a foreign court. In doing so the court does not hold that a marriage good by its own law has become bad by the decision of a foreign court; they still uphold the validity of the marriage. But the court of a country in which a marriage is celebrated, and according to the law of which the marriage is valid, cannot recognize an act upon the judgment of a foreign court declaring that the marriage is invalid, without stultifying itself. In this case effect can only be given to the Wurtemberg decree by preferring the Wurtemberg law to the Illinois law, which is just falling back upon the theory of the 'personal statute,' a theory which the learned judge has expressly stated he discards.

"The gist of the decision is just this: that the law of Illinois is the law which is to decide as to the validity of the first marriage, and by the law of Illinois the first marriage is valid; the law of Wurtemberg is not the law which is to decide as to the validity of the first, and by the law of Wurtemberg the first marriage is invalid; therefore the law of Illinois, the law which is applicable, is not to be applied, and the law of Wurtemberg, the law which is not applicable, is to be applied.

"Many decisions and authorities, as we have already intimated, are cited in this elaborate judgment. There is, however, one case not cited, which is exactly in point, viz.: *Simonin* v. *Mallac*, (29 L. J. Rep., P. and D., 97, 3 Swabey and Tristram, 67). By the Code Civil of France a marriage contracted abroad between a Frenchman and a Frenchwoman, or between a French subject and a foreigner, is not valid except it is celebrated after the publication and with the consent of the parents, if the man is under twenty-five and the woman is under twenty-one. The parties in this case of *Simonin* were French subjects and the woman was under twenty-one. They went to London with the express purpose of getting rid of this personal incapacity, and got married without making the publication or obtaining the consents required by the French law. The French courts held the marriage not valid, the English courts held that it was. The English courts could not recognize any artificial and local restriction imposed by the law of France, and held, in fact, that the validity of the marriage, when the only objection was with reference to the form, was to be determined by the law of the place of celebration. This is a much stronger case than the Illinois one, because in the latter the parties did not repair to Illinois to evade the law of their own country, but, on the contrary, they were at the time of the marriage domiciled in Illinois.

"Similar opinions to those acted upon by Sir Cresswell Cresswell in *Simonin's* case have been expressed in Scotland. In *Gordon* v. *Pye* (Ferguson's Consistorial Reports, p. 361), Lord Meadowbank puts the question, 'Would a marriage here be declared void because the parties were domiciled in England, and minors when they married here, and of course incapable by the law of their country of contracting marriage?' plainly intimating his own opinion that it would not.

One of the earliest and leading English cases, in which the whole twelve judges sat, is known as "Lolley's" case, where English subjects were married in England, and afterward the husband went to Scotland and procured an absolute divorce there, then returned to England and married another wife—*held*, that he was guilty of bigamy. This case turned upon the distinction in point of jurisdiction between a temporary and fugitive residence for the purpose of a divorce and a *bona fide* change of domicil by the husband and wife *animo manendi*.[1]

Another leading case was that of Warrender vs. Warrender, in which a Scotchman domiciled in Scotland was married to an English woman in England, and, by their marital contract, jointure was secured to her in his Scottish estate. After their marriage they went to Scotland and resided there a short time, and then returned to England. The wife went to the Continent and there remained, the husband remaining in Scotland, where he brought suit for a divorce for adultery. The vital question was whether, assuming the parties to be domiciled in Scotland, a suit could be maintained in Scotland for a divorce from an English marriage, which by the law of England was indissoluble—*held*, it could.[2]

A foreign tribunal has no authority, so far as any consequences in England are concerned, to pronounce a decree *a vinculo*, in the case of an English marriage between English subjects, unless such subjects are at the time of such decree pronounced, *bona fide* domiciled in this country where that tribunal has jurisdiction, and the suit is prosecuted without collusion.[3] When the court of a foreign country has jurisdiction of the parties and subject matter of the suit, and this affirmatively appears, its judgment or decree will be conclusive on the parties, their legal representatives and privies in all countries where the matters litigated are again drawn in question, and this is particularly so with

[1] 1 Russ. and Ryan's Cr. Cas., 237. [2] 9 Bligh. 89. [3] 3 H. L., 55.

respect to judgments or decrees affecting *status* of a person, they being in the nature of judgments *in rem*, which are binding on the whole world. The limitation to this rule is, that it may be shown such judgment or decree was obtained by means of fraud, or gross abuse of the process of the court, or flagrant departure from the ordinary course of judicial procedure.[1]

A marriage declared to be void, *ab initio*, is not made void by virtue of a decree of nullity. The decree is nothing more than a judicial declaration of the status of the marriage and the parties.[2] In a case where a marriage, celebrated in Massachusetts, had been dissolved in Vermont, upon a suit by the husband for a divorce for the cause of extreme cruelty of the wife, which was not a cause in Massachusetts, it appearing that the parties had not at any time a permanent domicil in Vermont, but had gone there merely to get the divorce, was held a mere nullity upon the ground that there was no real change of domicil.[3]

VI.

DIVORCE LAW IN EUROPE AND CANADA.

In England and Wales, prior to 1858, the civil courts had no jurisdiction at all in cases of divorce, but by an act of parliament, passed August 28th, 1857, it was provided that "no decree shall hereafter be made for a divorce *a mensa et thoro*, but in all cases in which a decree for divorce *a mensa et thoro* might now be pronounced, the court may pronounce a decree for a judicial separation, which shall have the same force and the same consequences as a divorce *a mensa et thoro* now has." Section 27 provides that "it shall be lawful for any husband to present a petition to the said court, praying that his marriage may be dissolved on the ground that his wife has, since the celebration thereof, been guilty of adultery.

[1] 104 Ill., 35. [2] 28 Ala., 565. 4 Johns Ch., 343. [3] 14 Mass., 227.

And it shall be lawful for any wife to present a petition to the said court, praying that her marriage may be dissolved on the ground that since the celebration thereof her husband has been guilty of incestuous adultery, or of bigamy with adultery, or of rape, or sodomy, or bestiality, or of adultery, coupled with such cruelty as without adultery would have entitled her to a divorce *a mensa et thoro*, or of adultery coupled with desertion, without reasonable excuse, for two years, or upward. Alimony may also be decreed, and damages obtained against a co-respondent. Decrees are always conditional for six months, at the expiration of which they *may* be made absolute. It shall be lawful for the respective parties to marry again as if the prior marriage had been dissolved by death."

In Scotland an absolute divorce is allowed for adultery of either spouse, or malicious desertion for four years. The effect of divorce is to restore both parties to the status of unmarried persons, but the party guilty of adultery cannot marry the *particeps criminis*, if so stated in the decree. And a judicial separation is granted for cruelty, or for adultery either, at the election of the injured party.

In Ireland there is no absolute divorce by courts, but they have suits for divorce *a mensa et thoro*, and nullity of marriages.

VII.

In *France* both marriage and divorce are regulated by the Code Napoleon. Age of legal consent is eighteen for the male and fifteen for the female. The male must have the consent of the father if he be under 25, and the female if under 21, or that of the mother, if the father be dead. If both be dead, the grandfather and grandmother take the place. Even after the above ages, consent must still be asked up to 30 and 25 respectively. And when parents and grandparents are dead, before parties are 25 and 21 respectively, consent of family council must be had, and many other precautions are re-

quired. A foreign marriage of French subjects is recognized, provided consent of parents and publication of banns is observed. The husband or wife may have a divorce for adultery, excesses, cruelty, or serious injury, or for a sentence to corporal or infamous punishment. The divorce system under this code is very complicated and has been frequently changed, but it constitutes the law of divorce, not only in France, but in several of the German provinces as well.

VIII.

In *Belgium*, the husband can be divorced for adultery of wife, and if the husband commits adultery with female at his home, the wife may obtain a divorce for that cause. Either may procure divorce for excesses, cruelty or grave injuries, or, being condemned to an infamous punishment on the part of the defendant, but when the cause is excesses, cruelty or grave injuries, a decree can only be granted of divorce *a mensa et thoro*, with an allowance. When the husband is at least 25 years old and the wife at least 21, and have been married at least two years, a divorce may be allowed on the mutual and persevering desire or consent of both parties, expressed as prescribed by law, under the conditions and desires which show that life together is insupportable. But it is inadmissable after twenty years of married life, or when the wife shall have reached her 45th year, and it must be approved by the parents or nearest living relatives, but a judicial hearing must be had, and great care is exercised by courts to see that the consent and desire is not forced or feigned.

IX.

In *Austria* the law concerning both marriage and divorce is very elaborate and strict. Insane, idiotic and feeble-minded persons, minors, and persons of an unsuitable age to

contract obligations, must have consent of father, or of the guardian, and the court. Minors of illegitimate birth must have consent of guardian and courts, and minors of foreign birth, if not able to obtain consent of father, must obtain consent of court. Consent is refused when income is not competent, or party is immoral, has contagious disease, or defects of mind or body, contrary, or destructive to, objects of marriage. Fear, abduction or duress are grounds for refusal. When wife is pregnant by another upon marriage, the same is voidable at election of husband.

Impotence before marriage is good ground for divorce. A person sentenced to imprisonment cannot marry till end thereof. Polygamy expressly forbidden. Those clergy consecrated to celibacy cannot marry, nor Christians and pagans. Consanguinity and affinity bar marriage, likewise adultery bars marriage between the participants. A valid marriage must have prior publication by banns.

There are provisions for divorce *a mensa et thoro* by mutual consent or by decree for adultery or conviction of crime, abandonment, leading a disorderly life, attempts on life or health of plaintiff, gross ill-treatment, repeated insults or lasting bodily defects, with fear of contagion; long continued absence will work a dissolution of marriage.

Catholics cannot be absolutely divorced, but others may be for adultery, commission of crime punishable by five years imprisonment, malicious abandonment or non-appearance after one year's solicitation, assault endangering life or health, repeated cruelty, unconquerable aversions on account of which both parties desire a divorce. But in the last case, a divorce *a mensa et thoro* must first be sought.

X.

In *Hungary*, marriage is decreed to be a civil contract. Minors cannot marry without the consent of father, or, if dead, the paternal grandfather. If both are dead, the guar-

dian's consent, approved by court, is necessary. If parental consent is refused, the party may appeal to the courts. To marry without prescribed consent, is void. Marriage between a Christian and a pagan is void. Marriage between both legitimate and illegitimate blood relations is void. Persons who have committed adultery, cannot intermarry. Marriage committed through fear or mistake may be annulled if there has been no voluntary cohabitation. Publication of banns requisite to legal marriage. When a marriage is declared void, all rights and obligations growing out of it cease. Custody of children vested in father, and both parents must contribute to support and education. Divorce may be had if a missing spouse is 80 years old, and missing for ten years; or if not heard from for thirty years; or if exposed to war, shipwreck or extreme peril, and not heard from for three years. Divorce may also be had among Protestants for attempt upon life, adultery, wilful desertion, unconquerable aversion or enmity when both of the parties demand divorce, but only after a limited divorce. Both parties may remarry, but not the person who was the cause of divorce. A limited divorce may be had for gross ill-treatment or seduction to vice and degradation.

XI.

In *Switzerland*, free consent is essential to the validity of a marriage, and no consent in cases of force, fraud or mistake of person. Parental consent is required in cases of parties under 20 years, and no marriage is valid except male be 18 and female 16. A marriage of a person already married is void; also between blood relatives of all grades, legitimate or illegitimate; also, likewise, certain instances of affinity. Lunatics and idiots can not marry, and widows, divorced women and women whose marriages have been declared void, can not marry until the expiration of 300 days. Official announcement required of all marriages. Objections may be

made, and marriage must be public and upon notice. If both parties ask for divorce, the court will grant it, if it appears that further cohabitation is impracticable.

Divorces may be granted for adultery after six months' knowledge; attempt upon life; ill-treatment, or a serious injury to honor or reputation: sentence to a degrading punishment; wilful desertion for two years, after six months' judicial summons to return; incurable mental disease of three years' duration. The guilty person cannot marry for one year: or three years, in discretion of court. Court has jurisdiction for incompatibility of temper to grant decree of divorce *a mensa et thoro* for two years. A marriage procured through force, fraud or mistake, may be avoided if suit is brought within three months.

XII.

In *Sweden*, divorce may be granted by the Ecclesiastical court, the consistory of royal court, consistory of Stockholm, and by the king in council, for adultery, wilful desertion, illicit intercourse of either party with third person before marriage but after betrothal, or by woman before betrothal; impotence or sterility, or incurable contagious disease contracted before marriage and concealed: attempt by either party against the life of the other; sentence to banishment or imprisonment for life, if the other party was innocent of the crime; incurable insanity, if the other party was not the cause thereof; and the king may divorce for an infamous crime, drunkenness, extravagance or violent behavior, or incompatibility of temper. In case of persistent discord, the court may decree a limited divorce for limited time. If divorce is granted for adultery of husband, he forfeits one-half the communal property; if for adultery of wife, she forfeits her own dowry. The party guilty of adultery may not remarry unless the other party has died, or remarried, or given consent with king's authority.

XIII.

In *Denmark*, divorce may be decreed for adultery, desertion, impotence, contagious disease existing at date of marriage, unknown to other party; sentence to imprisonment for life; mutual consent. Legal separation may be decreed for cruelty, serious injury, or other acts which render life unendurable; or a legal separation may be secured by mutual consent. Adultery is no cause if induced by mutual malconduct, nor if either party is equally culpable. Five years' unexplained absence is good cause, or three years' malicious absence. Impotence must have existed before marriage, and be incurable. The innocent party may marry, and the opposite party after three years, by leave of the king, but cannot marry accomplice in adultery.

XIV.

In the *German Empire*, the legal age of consent is twenty and sixteen years respectively; under the age of twenty-five and twenty-four, respectively, the parental consent must be had; if the father is dead, consent of the mother, or, if she be dead, of the guardian, must be had. Marriage is prohibited in cases of consanguinity, guardian and ward, or adulterer and *particeps criminis*. Women cannot marry till ten months from the end of their prior marriage. Banns must be published, and ceremony had before civil officer. The marriage ceremony is very formal and deliberative. Divorce is governed by the local laws of each state or province in the Empire.

In *Baden*, causes of absolute divorce are: Adultery of the wife; same of the husband, if he keeps the *particeps criminis* at his home; sentence of either to an infamous punishment; on public proclamation of disappearance; absence for three years; three years' insanity; mutual consent, if life is insupportable.

In *Elsass Lothringen*, the causes for permanent divorce are: Adultery of the wife, or of the husband if he keeps his *particeps criminis* at his house; excesses, cruelty or grave injury committed by either party; condemnation to an infamous punishment; the mutual and persistent desire of either for divorce, upon proof that life is insupportable.

XV.

In *Saxony*, the causes of divorce are: Adultery, sodomy or bestiality, criminal relation with children under twelve: bigamy: one year's desertion: one year's refusal to cohabit: self-caused impotency; to a wife if husband has incurable disease rendering cohabitation dangerous to life: three years' incurable insanity supervening after marriage: assault with intent to kill, or cruelty, endangering life; sentence for crime to three years: habitual drunkenness: change of religion: disappearance for considerable length of time. Temporary separation may be had for serious quarrels, likelihood that life or health of children may be imperilled: leading an immoral life. Party may, at discretion, sue first for a separation.

XVI.

In *Wurtemberg*, civil courts may grant divorce to Catholics for adultery. Causes for temporary divorce among Catholics are: Apostacy from Christianity: conversion to Judaism or Islamism: apostacy from Catholic Church: seduction to vice or felony: inciting to sodomy: pollution, etc. Cruelty or assault and injury to life or health: long-standing grievance or mortification: diseases acquired by lust which are contagious: wilful desertion: violation of duty endangering the civil or property rights of the other: dangerous mental derangement and mania for drink: impotence acquired during marriage: pregnancy of female by third party: sentence to imprisonment for years.

Causes for divorce among Protestants are as follows, viz.: Adultery, fornication of a betrothed person after betrothal with a third party, wilful desertion, refusal of wife to perform domestic duties, or of either party to cohabit for a year, attempt upon the life of one of the parties, incest, sodomy, attempt upon the life of an own begotten child, sentence to penal servitude for ten or more years if other party innocent, cruel and bitter enmity endangering life of other spouse. No divorce from bed and board; temporary judicial separation one year.

Among Jews, the following causes: Adultery of wife, apostacy from Judaism, sundry transgressions of Mosaic morals by wife, wilful desertion and depriving wife of means of subsistence, refusal to cohabit, impotence, loss of virginity of female before marriage, certain loathsome or diseased condition of husband, crime by husband necessitating his flight to foreign parts, repugnance, hatred or cruelty, conditionally.

XVII.

In *Prussia*, there are in operation three systems of divorce law: The general Prussian law, the common law, the civil code. The Code Napoleon is operative in the provinces bordering on the Rhine. The following are general causes for divorces: Adultery, wilful desertion, refusal to cohabit, self-caused impotence, assault upon life, health, liberty or honor, false accusation of serious crime endangering life, honor or office of either, natural or inculpable impotence, frenzy or insanity, commission of crime by one against the other, disorderly conduct or mode of life, refusal of support by the husband, unconquerable aversions. Common law causes are adultery, sodomy or bestiality, wilful desertion, refusal to cohabit, cruelty and assault, involving danger to health or life, sentence to imprisonment in a penitentiary for two or more years, false accusations.

XVIII.

In *Hamburg*, divorce may be granted for adultery, physical incapacity, voluntary abandonment for two years of wife, or three years of husband. If wife is pregnant at marriage by another man, a sentence of nullity may be decreed. When divorce is for adultery, guilty party cannot remarry.

XIX.

In the *Netherlands*, a divorce may be granted for adultery, malicious abandonment, sentence to imprisonment for four years, severe bodily injury or maltreatment, endangering life, by agreement after five years' legal separation; separation from bed and board authorized for violence, maltreatment and outrageous insults.

XX.

In *Roumania*, divorce may be had for adultery of wife or of husband if paramour is taken to home, violence, cruelty or serious injury, or condemnation to an ignominious or criminal punishment, mutual and continued desire of both parties, with proof that life is insupportable.

XXI.

In *Russia*, divorce is granted to members of the Greek church for adultery, impotence or sterility, condemnation to a punishment entailing loss of civil rights, and exile or deportation, desertion without tidings for five years.

XXII.

In *Poland*, causes for divorce are adultery, assault involving serious injury, commission of crime, or forcing others to do so, by mutual consent, if reasons are satisfactory to the court.

XXIII.

In *Finland*, the following are causes: Adultery, cruelty or assault involving serious injury, sentence for infamous crime, desertion, incurable insanity.

XXIV.

In *Italy*, the grounds for divorce are adultery of wife, same of husband if he publicly maintains paramour at home or elsewhere, voluntary abandonment, excesses, cruelty, threats and grave injuries, condemnation of one of the parties for crime; or the wife may demand a separation if the husband fails to establish a home in accordance with his means and rank in life. Separation may be demanded by mutual agreement, or cross demand, or by one alone.

Divorce *a vinculo matrimonii* was first allowed in Ireland in 1871, in Austria in 1868, in Switzerland and Germany in 1876. It would seem to have followed in the wake of, and as an adjunct to, advancing enlightenment, for it seems to have prevailed all over the civilized world, except in South Carolina.

XXV.

In *Nova Scotia*, any marriage may be dissolved or declared null and void for impotence, adultery, or kindred within the degrees prohibited in an act made in the 32d year of King Henry VIII.

XXVI.

In *New Brunswick*, the causes are frigidity or impotence, adultery, or consanguinity within the prohibited degrees.

XXVII.

In *Prince Edward's Islands*, causes for divorce are frigidity or impotency, adultery, consanguinity within prohibited degrees; but it is needless, as but two divorces have ever been granted there.

XXVIII.

In *British Columbia*, the causes are the same as in the English divorce courts. In Ontario no power seems to exist except such as arose under the ordinary Chancery practice to declare a marriage null for fraud, duress, lunacy and infancy; and alimony may also be allowed to the wife. In Quebec, a marriage may be declared void for impotence; and divorce may be allowed for adultery by wife, adultery by husband if he keeps paramour in the home; ill-usage, outrage or grievous insult.

XXIX.

THE "UTAH" DIVORCE LAW

AND PRACTICE THEREUNDER.

The first section conferred jurisdiction on the Probate court. The second section provided that, "The petition for a bill of divorce must be made in writing, upon oath or affirmation, and must state clearly and specifically the causes, on account of which the plaintiff seeks relief. If the court is satisfied that the person so applying is a resident of the territory, *or wishes to become one*, and that the application is made in sincerity, and of her own free will and choice, and for the purpose set forth in the petition, the court may decree a divorce from the bonds of matrimony against the husband for any of the following causes, to wit: (Here follow list of causes): And a husband may obtain a divorce from his wife also. Here is a copy of a petition:

"Nelson F. Hood vs. Maggie H. Hood. In the Probate court of Beaver county, Territory of Utah. The plaintiff complains and alleges that plaintiff and defendant are husband and wife; that they intermarried at Jeffersonville, State of Indiana, on the 3d day of July, 1869, and ever since have been, and now are, husband and wife; that plaintiff wishes to become a resident of Beaver county, Utah, but is so situated that he cannot at present carry his desires into effect. (He then recites some of the statutory causes for divorce in Utah). Signed, Nelson F. Hood,

A. Goodrich, *Plff's Atty.*

And it was sworn to before Goodrich as Comr. for Utah, and a decree duly obtained. (I may state that Goodrich used to charge $100 for these divorces—$25 cash and $75 when he got decree—and that he used to send the decree to

non-residents by express, C. O. D.) The decree in this case recited: "That said parties cannot live in peace and union together and that their welfare requires a separation, and that the plaintiff wishes to become a resident of the county of Beaver," etc. In this case, after plaintiff obtained his decree, he married an estimable young lady of Kentucky, and lived with her as his wife. Being indicted, he was convicted of bigamy and sentenced to imprisonment. The Supreme court sustained the sentence, holding the former marriage binding, and the latter null and void. Court gave its reason thus: "Hood desired to obtain a divorce from his wife. Neither of the parties were under the jurisdiction of Utah. The petition of Hood and the decree of divorce expressly state this fact. If he was not a citizen and resident of Utah, he was of some other State or nation. Still the court of Utah grants a divorce to a man who informs it, in his application, that he is under a jurisdiction other than that of the Territory of Utah, and that he is not subject to hers. The divorce manifestly was granted in violation of the sovereignty and jurisdiction of another State, and in violation of the plainest principles of international and constitutional law. The provision in the State of Utah, authorizing the courts to grant divorces to citizens of foreign states and nations who were not, but desired to become, residents of Utah, was *ultra vires* and void. * * To give jurisdiction in a divorce suit, the plaintiff, or petitioning party, must be a resident of the State or territory where the divorce is obtained. And this decision was sustained in every case where the question arose, and it came up in several different States.[1]

[1] 56 Indiana, 263. 16 Indiana, 429. 25 Indiana, 380. 46 Iowa, 437. 52 Iowa, 85. 13 Hun., 414. 19 Kansas, 451. 54 Iowa, 459. 25 Minn., 29. 13 Bush, 318.

XXX.

JURISDICTION.

Jurisdiction is the power to hear and determine a cause or controversy. Divorce was unknown to the common law, but was cognizable by the ecclesiastical courts in England. Hence we have no common law of divorce, but in all States, except South Carolina, we have statutory jurisdiction conferred. South Carolina, except under negro rule, has never recognized divorce in any way, and thus, is as austere in its outward marital morals, as it was, in 1861, flagitious in its politics. Courts of Chancery, in the exercise of chancery powers, might annul a marriage for fraud, accident or mistake in its making, like any contract, or for duress of the complaining party, but otherwise the power of the courts in matters of divorce are derivable only from express statute, which power must be strictly pursued, and nothing can be taken by intendment, or by implication. This is termed by lawyers, *jurisdiction over the subject matter*. If a court, having no authority at all on the subject, exercises the authority in such a case, or, having a limited authority, exceeds its authority in vital matters: in either case, its action is a nullity. Thus, if a New York court should attempt to grant a divorce for desertion, that being no statutory cause there, or if an Illinois judge should grant a decree for insanity, that being no cause there, either of such decrees would be a nullity and void. Nor can consent confer jurisdiction.[1]

Of equal importance is it to acquire *jurisdiction over the parties*. If a New York citizen should file a bill for divorce against his wife in the State of Illinois (she also being in the

[1] 6 Pet., 691. 12 Pet.,717. 5 Harr & J., 130. 8 Ore., 322. 18 Wall., 371. 3 N. J., 523. 6 Fost., 240. 6 Wheat., 125. 2 How, 60. 99 Mass., 273. 27 Ala., 397. 60 Ill., 333. 11 Wend., 648. 7 Hill, 10. 1 Denio., 158. 3 Chand., 8. 5 Fost., 303. 33 N. H., 238. ib., 167. 10 Bush., 269. 8 How. Pr., 99. 63 N. Y., 460. 7 Sawy., 401. 13 O. S., 439. 3 O. S., 499. 3 Metc., 462. 31 Barbour, 661.

State of New York), the court would have no jurisdiction over either party; and the bill would be dismissed by the court of its own motion, if the fact appeared in either the pleadings or proofs.

When courts exercise a special and statutory authority, these proceedings stand on the same footing with those of courts of limited and inferior jurisdiction, and will be invalid, unless the authority in which they are founded has been strictly pursued.[1]

Divorce is a special and statutory authority, not recognized by the common law, and the proceedings in relation to it, stand on the same footing with those of courts of limited and inferior jurisdiction, so that its power in the case must be shown and appear to have been strictly pursued.[2] The jurisdiction of inferior courts must appear on the face of their proceedings, and extend to the parties as well as to the cause of action; and the acts of such tribunals will be invalid unless the record shows affirmatively that the defendant appeared, or was summoned, or was, in some way, notified of the suit, and of the necessity of answering what was alleged against him; and when want of notice appears affirmatively on the record, or by any other legitimate means of proof, the defect will be fatal.[3] A judgment, *in personam*, rendered without notice or appearance, or a sufficient excuse for want of notice, will be regarded as invalid by foreign tribunals, and if binding at home can only be so by force of positive law. A Connecticut or Illinois divorce is no defense to an indictment for bigamy in Massachusetts[4] or Pennsylvania, unless it appears of record that both were legally before the court, and subject to its authority.[5] A divorce granted to the husband may be avoided collaterally by evidence that the wife was not domiciled in the State when the decree was pronounced, was not served with process, and did not appear.[6] While a decree or

[1] 1 Smith, Lead. Cas., 1127. [2] 97 Mass., 540. 25 Minn., 37. 96 N. Y., 463. 39 Wis., 171. [3] 19 Johns., 39. 11 Mass., 507. 8 Vt., 373. 7 S. & M., 85. 4 Binn., 97. 11 Mass., 507. 3 Cow., 59. 11 Wend., 647. 27 Ala., 391. 95 U. S., 714. 27 Ala., 391. 106 U. S., 350. [4] 97 Mass., 538. [5] 55 Penn., 375. [6] 97 Mass., 338. 12 P. F. Smith, 308. 15 Johns., 140.

judgment which stands unreversed and in force, cannot be called in question, or impeached in collateral proceedings by one of the parties to the original suit, it is a very different proposition to maintain that an innocent party cannot invoke[1] the power of the court by which the original judgment or decree was rendered, to vacate and annul it on the ground that it was procured by a fraud practiced upon the court, to his gross injury. * * Courts of justice have power, on proceedings had, to set aside or vacate their judgments and decrees, whenever it appears that an innocent party, without notice, has been aggrieved by a judgment or decree obtained against him or her without his knowledge, without the fraud of the other. Where a decree of divorce has been obtained by fraudulent means and false representations as to parties' domicil and residence, which gave the court an apparent jurisdiction in a case where there was no rightful jurisdiction, the injured party may, within reasonable time after discovery of the fraud, have such decree set aside on a bill filed to impeach the same.[2]

That a judgment is conclusive upon parties and privies is a proposition not to be denied; but if a court has acted without jurisdiction, the proceeding is void, and if this appears on the face of the record, the whole is a nullity.[3] To give any binding effect to a decree it is essential that the court shall have jurisdiction of the person and the subject matter; and the want of jurisdiction is a matter that may always be set up against a judgment when sought to be enforced, or when any benefit is claimed under it; the want of jurisdiction makes it utterly void and unavailable for any purpose. No lawyer will controvert the position that to uphold and give validity to the proceedings of a court, it must have jurisdiction of the person of the defendant and of the cause. This principle is applicable to all courts, from the lowest to the highest. Judgments of all courts are void in absence of jurisdiction; but that while the jurisdiction of

[1]108 Mass., 597. [2]120 Ill., 377. [3]11 Wend., 652. 15 Johns., 141. 19 Johns., 133.

superior courts will be presumed unless manifestly wanting, no such intendment can be made in case of inferior courts, and their proceedings will be nullities unless they show jurisdiction over cause and parties. A judgment may be attacked on the ground that defendant did not appear and was not served, even though the record says otherwise.[1] A decree of divorce obtained by fraud is void, has no binding effect, and may be impeached and set aside, even though a subsequent marriage by one of the parties may have been consummated, and children born of such marriage.[2] Where there is a cause of action arising from a fraud, the statute of limitations will not begin to run until the discovery of the fraud, if due diligence to discover it has been used, provided any fact existed to put the party upon inquiry.[3]

A court of general jurisdiction may have specific powers wholly derived from statute, not exercised according to the course of the common law, and which do not belong to it as a court of general jurisdiction. In such cases, its decisions must be regarded and treated like those of courts of limited and special jurisdiction. The jurisdiction in such cases, both as to the subject-matter of judgment, and as to the person to be affected by it, must appear by the record, and everything will be presumed to be without the jurisdiction, which does not distinctly appear to be within it.

These sections are in derogation of the common law, and must be strictly pursued, in order to give the court jurisdiction over the person of the defendant. A failure to comply with the rule then presented in any particular, is fatal when it is not cured by appearance.[4] When the special powers conferred are exercised in a special manner, not according to the course of the common law, or when the general powers of the court are exercised over a class of cases not within its ordinary jurisdiction, upon the performance of prescribed conditions, no such presumption of jurisdiction will attend

[1] 15 Tex., 500. 24 Tex., 551. 13 Gray, 591. 1 Clarke, 588. [2] 4 Metc., 335. 120 Ill., 389. 108 Mass., 590. 30 Wis., 452. [3] 46 Iowa, 648. Ib., 437. 2 Sto. Eq., J., 1521 a. [4] 5 Foster, 302.

the judgment of the court. The facts essential to the exercise of the special jurisdiction must appear upon the record.[1]

In cases where a court of general jurisdiction exercises a special power conferred upon it by statate, not according to the course of the common law, it must strictly comply with all the requirements of the statute in its proceedings, and this compliance must affirmatively appear from the record itself, and unless it does so appear, *no* presumption will be indulged, to sustain the validity of its judgments or decrees.[2]

The law of the place of the actual *domicil* of the parties governs in all cases of divorce, regardless of the place where the marriage was celebrated.[3]

What, then, is domicil?

I answer: that place is properly the *domicil* of a person in which he has voluntarily fixed the habitation of himself and his family (if he has a family), not for a mere special and temporary purpose, but with a present intention of making it his permanent home, unless and until something (which is unexpected or the happening of which is uncertain), shall occur to induce him to adopt some other permanent home.[4]

* * * Where he has his true, fixed permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning.[5]

* * * The established, fixed, permanent or ordinary dwelling place, or place of residence of a person, as distinguished from his temporary and transient, although actual, place of residence. It is his legal residence as distinguished from his temporary place of abode; or a home, as distinguished from a place to which business or pleasure may temporarily call him.[6]

* * * When a person has fixed his habitation and has a permanent residence, without any present intention of removing therefrom.[7] In international law, *domicil* means a

[1] 18 Wall., 350. [2] 8 Ore., 322. [3] 13 Johns., 194. 19 Ala., 499. Story Conf. Laws, s. 230 a. [4] Kindersley V. C., in Lord v. Colvin, 4 Drew, 376. [5] 42 Vt., 350. 9 Ired., 99. Bouvier's Law Dict. [6] 20 Conn., 74. [7] 4 Barb., 504.

residence at a particular place, accompanied with positive or presumptive proof of intending to continue there for an unlimited time.[1] A residence at a particular place, accompanied with an intention to remain there for an unlimited time, is a residence accepted as a final abode.[2]

The place in which the person has taken up his permanent residence, and to which, when he is absent from it, he has the intention of returning; residence, as determining the municipal law to which a man is subject.[3]

A recent case made the following statement as to the domicil and status of parties: "Marriage is a civil status. The rights and obligations of the parties are not merely contractual, but are fixed, changed or dissolved by law.[4] In case of a conflict of laws, the *lex domicilii* controls the status of the person, though his contractual or property rights may be subject to other laws.[5] The State has the absolute right to declare or alter the civil status of all its inhabitants, no matter where they may temporarily be, and no matter where the contracts or acts giving rise to such status may have been made or done. Other States or countries will, in this matter, accept without question the declaration of the courts of the home State. But the State has this power only over its own inhabitants. The mere presence within its limits of the inhabitants of other States gives it no authority to fix or change their *status*. The State of their residence still retains its control over that. It alone can free its citizens from marital obligations. Any proceeding of another State to that end, will be ineffectual and will be disregarded elsewhere. In this case the marriage was in this State, and the parties lived here for awhile Party got a divorce in Illinois, and the court then found and declared, that he was an inhabitant of Illinois. (U. S. Const., Art. IV., Sec. 1.) It has been settled, however, by judicial construction, that the constitutional provision only applied when it appeared that this court had jurisdiction in fact. *The clause quoted does not*

[1] 32 N. J. Law, 192. [2] Wharton's Law Dict. [3] Burrill's Law Dict. [4] 18 Wall., 457. 95 U. S., 914. [5] 122 Mass., 156. 41 N. Y., 272. 46 N. Y., 30.

make a court's own declarations of its jurisdiction binding on the courts of other States. One court cannot by a simple *ipse dixit* compel other courts to yield jurisdiction. It has been repeatedly held, therefore, that a court's jurisdiction can always be inquired into, even against the express recitals and findings of the court. In the case at bar the residence of the party at the time, was the one fact which would uphold or defeat the jurisdiction of the Illinois courts. The judge declined to be bound by the recitals of the Illinois court. *Sustained.* If the Illinois court had no jurisdiction over the status of the husband, by reason of his non-residence in that State, he being an inhabitant of this State, that court could not effectually make any decree for any cause. Its decree for whatever cause would be void for want of jurisdiction over the person of libellant.[1] Residence means "a legal residence," not an actual residing alone, but such a residence as that when a man leaves it temporarily, or on business, he has an intention of returning to, and which, when he has returned, becomes, and is, *de facto* and *de jure*, his domicil, his residence.[2] There must be a fixed habitation, with no intention of removing therefrom.[3] The alleged decree of divorce obtained by the husband was without any notice to the wife in a country wherein neither party ever resided, and for an alleged cause wholly fraudulent. It is therefore *void*.[4] Will vacate decree or treat it as a nullity.[5] Jurisdiction of a divorce suit is not sustained by a residence taken up for the mere purpose of bringing the suit, although it is continued for the length of time required by law, and may be shown to be void by evidence *aliunde*.[6] (The case of Kinnear, 45 N. Y., 535, and case of Cheever v. Wilson, 18 Wall., appear to enunciate a contrary doctrine; but they have no force as authority. They are mere stumbling-blocks.)

Held in Wisconsin, that the law meant an actual residence,

[1] 78 Me., 187. 42 N. J. Eq., 152. 41 N. Y., 272. 76 N. Y., 78. 101 N. Y., 23. 108 N. Y., 628. 19 Neb., 706. 52 Mich., 117. 56 Wis., 195. 3 Mc. A., 415. 25 Minn., 29. [2] 1 Iowa, 36. 36 Iowa, 10 108 Mass., 590. 51 N. H., 588. [3] 46 Iowa, 437. [4] 19 Kan., 451. 56 Ind., 263. 122 Mass., 156. [5] 20 N. Y. S., 414. 28 N. J. Eq., 315. [6] 25 Mich., 247. 46 N. Y., 30. 55 Barb., 269.

"actual and *bona fide*, *animo manendi* (with the intention of remaining.)"

If a party goes to a new State with intent to reside in the latter, although the main purpose be divorce, it is good. As I have elsewhere intimated, divorce law is not logical or uniform; and cases can be found in various States, not only contradictory of each other, but hardly based upon understood legal principles:[1] and I recollect a case about alimony decided in 71st Alabama, which the same court, within a few years thereafter, expressly overruled because of the utter impracticability of maintaining the first decision.[2]

In New Hampshire it has been held that courts will not take jurisdiction of a cause for divorce arising out of the State, unless complainant at the time was domiciled there. [3]

In Texas, it has been held that courts have jurisdiction though defendant be permanently resident abroad, if the marriage was solemnized in Texas and the act committed there. [4] In Missouri it is held that a non-resident wife can not sue husband for divorce, although the husband resided, and the cause accrued, in Missouri. [5]

One of the most important and interesting questions which confront the profession and society at this time is what effect a decree of divorce rendered in one State will have in another: i. e., of what avail or value is the decree of a Dakota or Colorado (or any other) court in New York or any other State than that in which it is rendered? No definite answer can be furnished to such question, because the practice is not only not uniform among the States themselves, but it is not uniform in the same State at different periods of time.

The rule was supposed to be, that a decree fairly rendered on substituted service by publication according to the *lex fori*, was valid anywhere, and it was generally so held, notably in Rhode Island, New York and by the Supreme court of the

[1] 39 Wis., 651. [2] 36 N. W. Rep., 607. [3] 58 N. H., 283. [4] 54 Texas, 261. [5] 6 Mo., App., 49.

U. S.: the case of Ditson, 4 R. I., being especially well reasoned and elaborate: but the tendency of courts, of late years, has been to check the obtaining of unmerited and fraudulent decrees in States other than those of the true domicil; and, pursuing this tendency, they have inclined to impinge upon what had been supposed to be an established principle; viz.: that a *valid* divorce obtained in one State was also valid and had the same effect in all other States that it did in the State of its origin. The observance of this principle did not aid a *fraudulent* divorce. It only pertained to *valid* divorce, untainted by fraud; but, as the law is now adjudged in many jurisdictions, a decree of one State rendered on substituted service is unavailing in another State.

In a case in the Supreme court of the United States, it was held that substituted service by publication, or in any other authorized form, is sufficient to inform a non-resident of the object of proceedings taken when property is once brought under the control of the court by seizure or some other equivalent act; but when the suit is brought to determine his personal rights and obligations, that is, where it is merely *in personam*, such service is ineffectual for any purpose.[1] Process from the tribunals of one State can not run into another State and summon a party there domiciled to respond to proceedings against him, and publication of process or of notice within the State in which the tribunal sits can not create any greater obligation on him to appear. Process sent to him out of the State, and process published within it, are equally unavailing in proceedings to establish his personal liability. "In respect to such suits *in personam* * * * there is no pretense to say that such modes of proceeding can confer any legitimate jurisdiction on foreigners who are non-residents and do not appear to answer the suit, whether they have notice of the suit or not. The effects of all such proceedings are purely local, and elsewhere they will be held to be nullities."[2]

[1] 95 U. S., 714. 18 Wall, 457. 11 How., 165. 5 Mass., 35. 9 How., 336. Story's Confl. Laws, sec. 546. [2] Story's Confl. Law, 546.

In Illinois, under their Chancery jurisdiction, a decree rendered upon publication can be opened up and a defence made at any time within three years, and then, five years are allowed to bring writ of error, file a bill to impeach, etc., so that a decree on publication in that State is not stable till eight years have elapsed from its date.

In a recent case there the husband obtained a divorce on a notice by publication in September, 1869. The wife, who was in New York, did not learn of it till May, 1883; she then, on December 22, 1883, filed, in the same court, a bill in the nature of a bill of review, to impeach the decree for fraud, and her action was sustained. Her husband, meanwhile, had married again and raised a family by the second wife, but the court remorselessly held that "although the party had re-married and had children, it made no difference about impeaching the decree, if the same was obtained by fraud."[1]

Parties married in New Jersey and lived together as man and wife for nine months, and then separated. The wife left the State and became a resident of Michigan *bona fide*; and after the proper statutory residence, commenced suit for divorce—made constructive service by publication, procured a decree, and, returning to New Jersey, married again, and then she and the second husband went to Michigan, where they resided and continued to reside, *animo manendi*. The first husband had not any notice of the Michigan suit till after a decree. After she married the second time, the first husband brought suit for divorce in New Jersey, alleging adultery with the second husband. Court said: "The decree of divorce obtained in Michigan is * * * a nullity. Whatever its effect in Michigan, it must be held here to be of no effect; and consequently it must be adjudged that the marriage between the parties * * still subsists. It follows, that that decree constitutes no warrant or legal justification in this State for the defendant's intercourse with the

[1] 120 Ill., 377. 51 N. H., 388. 108 Mass., 590. 23 Kan., 513. 73 Ill., 577. 6 Minn., 458. 15 Johns., 12. 30 Wis., 667. 1 Johns., 424.

second husband, and cannot be interposed to shield her from the consequences thereof in this suit; and it matters not where that intercourse took place, whether in this State or elsewhere."[1]

In People vs. Baker the husband married the wife in Ohio in 1871. They lived together in New York till 1872, when the wife returned to Ohio and resided there continuously till 1876, when she died:—that in 1874 the wife brought suit for divorce in Ohio against the husband, who continued to reside alone in New York and made publication according to requirements of the Ohio law, and obtained a divorce; then she, in Ohio, married a second husband, and, after living with him one year, died. The divorce was granted in June, 1874. On November 14, 1874, the first husband married a second wife in New York and was indicted for, and convicted of, bigamy. The conviction on appeal to the Court of Errors was sustained, the court stating the question thus: "Can a court in another State adjudge to be dissolved, and at an end, the matrimonial relations of a citizen of this State, domiciled and actually abiding here throughout the pendency of the judicial proceedings there, without a voluntary appearance by him therein, and with no actual notice to him thereof, and without personal service of process on him in that State?" and the court decided in the negative: and the man served out his sentence. [2]

The constitution of the United States provides that: "Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State, and the congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved: and the effect thereof." [3]

And the judiciary law of congress, of May 26th, 1790, after providing a method of authentication, further enacted: "And the said records and proceedings, authenticated as aforesaid,

[1] 42 N. J., Eq., 154 (1886). 1 Stew. Eq., 581. 31 Barb. 69. [2] 76 N. Y., 78. 15 John 121. 13 Wend., 407. 12 Barb., 640. 41 N. Y., 272. 46 N. Y., 30. 1 Dev. & Bat., 576. 1 Johns., 524. 60Barb., 108. 4 Dana., 388. 4 Paige,425. [3] Const. Art IV., Sec. I.

shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which the said records are or shall be taken." [1]

Under this law it has been held, over and over again, with nothing *contra*, that: "When a judgment or decree of the courts of another State is sought to be enforced in a court of this State, the court in this State may inquire into the jurisdiction of the court which rendered the judgment or decree: and if it appears that the court has no jurisdiction, the judgment or decree is void: but, if it had jurisdiction, the decree is valid and binding in this State." In deciding upon the effect to be given to a judgment or decree so rendered in another State, it must be regarded as well settled that the record of decree must have the same effect in this State as in the State where it is rendered. [2] Again: "'This full faith and credit,' however, to be given to the record of another State, is limited to cases where the courts have obtained jurisdiction." "Courts cannot obtain jurisdiction over a citizen of another State without personal service in their own State." "Even personal service in the State of defendant's residence would not give jurisdiction in the divorce" State. Even when a prosecution for bigamy is made on a marriage after such a divorce, it is not essential to prove intent or guilty knowledge. [3]

On the contrary, it is stated by one of our highest legal authorities: That courts of the State where the complaining party resides, has jurisdiction of the subject matter, and, if the other party is a non-resident, they must be authorized to proceed without personal service. The publication which is permitted by statute is sufficient to justify the granting of a decree, changing the *status* of complainant, and thereby terminating the marriage. And it is immaterial whether notice was actually brought home or not. And it might also be

[1] Rev. Stat. U. S., [2] 27 W. Va., 167. 25 Mich., 247. 55 Barb., 269. 18 Wall., 457 67 How., N. Y. Pr., 144. [3] 18 Wall., 457. 7 Cr., 481. 6 Wend., 448. 1 Dev. & Bat. 576. 1 Johns., 425. 41 N. Y., 272. 4 Paige, 425. 25 N. Y., 390. 76 N.Y., 78.

sufficient to decide the question of custody of children, if within the jurisdiction. But court cannot make a decree for the payment of money by the defendant not served and not appearing, not even for costs. It is limited to a divorce and custody of children within the State.[1] 1 Gill. and Johns. 463. 4 Ham., 440. 10 Ohio, 28. 19 Ala., 499. 9 Me., 140. 4 Barb., 295.

The contrary has been held, notably in 76, N. Y. 78; 101 N.Y., 23, and 108 N. Y., 628. In a case which came up in the Supreme court of the United States it was held that a decree of divorce valid and effectual by the laws of the State where it was obtained is valid and effectual in all other States. Whether the finding of the court of domicil in which the decree was founded, is conclusive or only *prima facie* sufficient, is not decided.[2] But in a later case it was decided that the court had authority to inquire into the jurisdiction.[3] The most elaborately reasoned case in support of this doctrine, that it is "sufficient if one of the parties is domiciled there, and citation need not be personally served," is in Rhode Island.[4] And in another cause, the court said: "Where it is a foreign divorce, it don't matter whether or not it is for a cause not good where it is attempted to be used. If it be not fraudulent and the court had jurisdiction, it binds the world."

However, in a case which arose in North Carolina, and where a decree obtained in Tennessee was attempted to be used, the court refused to be bound by it, saying: "It was not an adjudication between any parties, since the wife did not appear in the suit, nor was served with process, and was not a subject of Tennessee, but was a citizen and inhabitant of this State, and therefore not subject to the jurisdiction of Tennessee, nor amenable to her laws."[5]

In Massachusetts, held that a judgment of a court of competent jurisdiction, having jurisdiction of the subject and of the parties, by legal process duly served where no appeal,

[1] Cooley's Const. Lim., 499. 2 Strob. Eq., 174. 3 Wis., 662. 4 R. I., 87. 80 Ky., 353. 28 Ala., 12. 42 N. J. Eq., 152. 1 Johns., 424. 7 Dana, 181. 76 Ind., 123. 4 Chand., 97. [2] 8 Wall., 108. 10 Tex., 355. 2 Blackf., 407. Wright, 286. [3] 18 Wall., 457. [4] 4 R. I., 87. [5] 1 Dev. & Bat. Eq., 568.

writ or error or bill for review or other legal process, lies for revision affirming or reversing such judgment, or, when no such process is commenced by the party who would avoid the judgment in the mode and within the time prescribed by law, is conclusive upon the same parties in any other proceeding in law or equity, or before any other judicial tribunal. In this case, the wife filed a libel for divorce, and set up *inter alia* that her husband had previously obtained a decree against her by perjured evidence. *Held*, not good: and that whether it could be attacked by a direct proceeding for fraud was not decided.[1]

It has been so often held in New York latterly, as to be the settled law there, that the marriage relation is not a *res* within the State of the party invoking the jurisdiction of a court to dissolve it, so as to authorize the court to bind an absent party, a citizen of another State, by substituted service, or actual notice given without the jurisdiction of the court where suit is pending.

The regulation of the marriage relation, and of the acts or neglects that may amount to a good cause for sundering that relation, is a matter of internal police important to, and affecting not only the parties to that relation, but the well-being of the State. It would seem it should be administered wholly by the courts of the State where the declared violations of the marriage relations occur, or where the parties are domiciled at the time. The acts relied upon for the cause of divorce must have accrued while the parties were subject to the law of the forum, where the divorce was granted. Otherwise the courts in one jurisdiction might determine and administer the marriage relations between citizens domiciled in another jurisdiction. This would allow one jurisdiction to pass laws, in the language of Lord Ellenborough in 9 East, 192, "to bind the rights of the whole world, a proposition too absurd to require refutation."[2] And in some of these decisions, the doc-

[1] 2 Gray, 634. [2] 130 N. Y., 93. 120 N. Y., 485. 108 N. Y., 415. 101 N. Y., 23. 60 Hun., 189. 47 Vt., 672. 10 Mass., 260. 14 Mass., 227. 2 Gray, 369. 7 Watts, 349. 7 Dana, 181. 2 Strobh. Eq., 174. 9 La., 317. 1 Dev. & Bat. Eq., 568. 15 Johns., 121. 13 Wend., 407. 2 Blackf., 407. 19 Ala., 499. 76 N. Y., 78. 31 Barb., 69.

trine is squarely stated to be, that the decree rendered in a suit for a divorce, in a State where the cause of action did not accrue, and where the parties were not then living as husband and wife, and where the defendant in the proceedings never was served with process, nor voluntarily submitted to the jurisdiction of the court, is wholly void in any other jurisdiction than the one in which it was rendered.[1]

In Michigan, it was adjudged that, where a husband resides in one State and the wife in another, either State has authority in respect to the marriage relation to determine on its validity or to dissolve it so far as the party resident within its limits is concerned, and if one proceeds in one State, such procedure is no impediment to the other taking like steps in the other State where it is necessary to protect property rights.[2]

The doctrine, which is more logical, and has been more generally understood by the profession to be correct, is that a judgment of divorce rendered by the court of another State against a domiciled citizen thereof, upon a substituted service (as publication), such as the law of the State has authorized in the case of an absent defendant, is valid *in personam* so as to effect a dissolution of the marriage contract, and is conclusive on the defendant in the courts of this State, although he was not within the territorial jurisdiction during the progress of the suit, and did not appear therein.[3] But it is held that a temporary residence, selected with any other intention than that of making it a domicil permanently, is not sufficient, even if extended the proper length of time.[4] In England it was held that a divorce pronounced by a foreign court between persons who had contracted marriage in England, and who continued to be domiciled in England, on grounds which would not justify such a divorce in England is not good in another jurisdiction.[5] And it has been repeatedly held that a divorce granted in a State where neither party lives, is void.[6]

[1] 108 N. Y., 415. [2] 24 Mich., 180. [3] 72 N.Y., 217. 95 U. S., 714. 104 Ill., 35. 115 Mass., 438. 24 Mich., 180. 4 R. I., 87. 9 Me., 140. 67 Iowa, 35. 45 N. Y., 535. 9 Wall., 108. [4] 46 Ia., 437. 70 Ia., 94. 54 Ia., 429. [5] Steph. Cr., 188. [6] 125 Ind., 163. 19 Neb., 706. 19 Kan., 451.

I here state some points made in a recent closely contested case: When these parties were born, their parents were residents of New York. From the time the defendant (the husband) was four or five years old, he was with his parents in Europe and New York, alternately. In 1868, plaintiff went to Dresden and married defendant; soon after, the parties came to New York—thence went to Colorado, in the fall of 1870, returned to Dresden; remained till 1881, when plaintiff returned to New York. Dresden was by them treated as their European home, and they traveled much in Europe. * * The question whether he had ceased to be a resident of New York was dependent upon his intention.

* * The defendant was not without his domicil, and unless another was acquired by him elsewhere, he retained his domicil of origin. And to effect a change of it, the fact and intent must concur. In legal phraseology, residence is synonomous with inhabitancy or domicil. * * The defendant, however, obtained a divorce from the plaintiff in Dresden, Germany, and, if such was obtained according to the laws of Germany, and the parties were domiciled there, "although the defendant in it was then absent from the empire and did not in any manner appear in the action." In such case a party whose domicil is in a country, is subject to its laws and jurisdiction of his person as well as of the subject matter, and jurisdiction may be acquired by the court, in the manner provided by its laws. But a court has no extra-territorial jurisdiction, and a person not domiciled in the State or country cannot be charged *in personam* by adjudication there, unless he is personally served with notice or process within it, or voluntarily submits himself to the jurisdiction of its court by appearing in some manner in the action or proceeding sought to be instituted against him.[1]

If the husband has forfeited his marital rights by misbehavior, and has deserted his wife, they are capable of having

[1] 120 N. Y., 485.

different domicils.[1] A divorce may be decreed where the husband has left his wife, and established his domicil in another State, and then committed adultery.[2] The law of the domicil at the time and place of the injury is the rule for everything but the original obligation of the marriage.[3] Although, in general, the domicil of the husband is the domicil of the wife, yet, if he be guilty of such defection of duty as entitled her to have it partially or wholly dissolved, she may establish a separate jurisdictional domicil of her own.[4] Although the domicil of the wife is that of the husband, yet she may acquire a distinct domicil of her own, where the act complained of occurred, for purposes of divorce.[5] Where the desertion occurred in Massachusetts, where the parties resided, and the wife removed to New Hampshire, remaining there three years, during which the desertion continued, a divorce was decreed.[6] The common law maxim, that the domicil of the wife follows that of the husband, has no application in an action for divorce where a separation has actually taken place.[7] In such case, the law will recognize the wife as having a separate existence and separate rights. A change of domicil requires no certain length of time, and length of time alone is not sufficient. There must be a *bona fide* and permanent intent, in mind and in fact.

A change of domicil can never be effected by intention to change, however sincere; a physical residence is as necessary as a moral intent, and until such physical residence is effected, the old home continues to be the domicil.[8]

The circumstances of each case will be scrutinized by courts whenever a test of the validity of divorces obtained by newly fledged citizens of "easy divorce" States shall be made.

We already have a foreshadowing of what the courts will probably do in such cases, in the decision rendered by the Chancellor of New Jersey, in case of Winship vs. Winship, 1 C. E. Green, 107. This was a case, perfect in its jurisdic-

[1] 9 Green., 140. [2] 27 Wis., 418. [3] 14 Ill. app., 645. [4] 7 Watts, 349. [5] 4 R. I., 87. [6] 29 Ala., 719. [7] 34 N. H., 318. [8] 12 How. Pr., 32. 14 Bradw., 645. [9] 12 Barb., 640.

tional and technical aspects; the party had just barely acquired his domicil within the State, and had a technical case. The court, however, denied the decree on the broad ground hitherto suggested; the Chancellor, alive to the responsibilities of the occasion, stated the grounds of his denial thus:

"I know that the language of the statute is very broad and may in its terms embrace the case now under consideration. But I nevertheless think that the legislature were legislating for the citizens of this State as contradistinguished from pseudo citizens for divorce purposes, not for others. The subject is one of grave importance, and is daily assuming a more serious aspect. At this hour, a large proportion of the divorces asked for in this court is by citizens of other States, who come into this State for the mere purpose of obtaining a divorce, and often in evasion of their own laws. There is too much reason to apprehend collusion of parties in actions of divorce, in regard to the establishment of a domicil, as well as with respect to the procedure. Conflict of jurisdiction, injury to morals, reproach to our law, oppression and fraud, as well as obloquy to the judicature which must administer the law, are evident consequences which must follow from the influx of parties from other States to obtain a dissolution of marriage here, in opposition to the rules of their own law."

"Marriage, though in one sense a contract, because being both stipulatory and consentual, cannot be valid without the spontaneous concurrence of two competent minds, is, nevertheless, *sui generis*, and unlike ordinary or commercial contracts, is *publici juris*, because it establishes fundamental and most important domestic relations. And therefore, as every well organized society is essentially interested in the existence and harmony and decorum of all its social relations; marriage, the most elementary and useful of them all, is regulated and controlled by the sovereign power of the State, and cannot, like mere contracts, be dissolved by the mutual consent only of the contracting parties, but may be abrogated by the sovereign will, either with, or without, the consent of both parties, whenever the public good, or justice to both or either

of the parties, will be thereby subserved. Such a remedial and conservative power is inherent in every independent nation, and cannot be surrendered or subjected to political restraint, or foreign control, consistently with the public welfare. And, therefore, marriage being more than a contract, and depending essentially on the sovereign will, is not, as we presume, embraced by the constitutional interdiction of legislative acts impairing the obligations of contracts. The obligation is created by the public law, subject to the public will, and not to that of the parties. So far as a dissolution of a marriage by public authority may be for the public good, it may be the exercise of a legislative function; but, so far as it may be for the benefit of one of the parties, in consequence of a breach of the contract by the other, it is undoubtedly judicial." * * Marriage being * * an *organic* institution in every civilized and well regulated nation, no such nation can preserve its own social order, or enjoy its independent right to secure its own welfare in its own way, if any other sovereign would, without its consent, dissolve or disturb that domestic relation of its citizens which is most essential to its prosperity, moral power or happiness. To concede such a right of foreign interference would be as suicidal in principle as to acknowledge foreign control over any other institution, or the *terra firma*, of a State. And therefore, it would seem to be sufficiently obvious, without the light of direct judicial authority, that no nation should ever arrogate any such power over the marriage contract of foreigners not domiciled within its jurisdictional limits, and that no free State, regardful of its rights or its dignity, should ever, by acquiescence or otherwise, recognize any such assumed right of intermeddling with its domestic institutions, by any foreign State." * * There may be an exception in those cases in which husband and wife, while continuing citizens, either in law or in fact, of one nation, become *bona fide* domiciled within the jurisdiction of another nation, for it seems to be the prevailing modern opinion that the conju-

gal rights and relations may always be regulated, and sometimes, if not always, abrogated, by the sovereign of the actual domicil, if established in good faith. It is well settled that international jurisdiction does not arise from the mere bringing of suit except as to matters of *status* or other proceedings in *rem*. The defendant must have been served with notice according to statute and within the jurisdiction of the *lex fori*, else must voluntarily appear, to confer jurisdiction.[1]

A decree of divorce could only be void for want of jurisdiction over the subject matter, by reason of the court which rendered it having no authority to pronounce such a decree. And the way to take advantage of it, is to raise the objection by a plea in bar, denying the jurisdiction and power of the court which made the decree; and the proof in support would consist of an exhibit of the statute law of the State, including the latest enactments on that precise subject. If it was merely erroneous, it would have to be corrected by writ of error to the review court of the State which rendered it.

The proper way of taking advantage of a decree of another State, which is alleged to be void for want of jurisdiction over the parties, is by craving oyer of the record and demurring to the bill or libel, if it appeared on the face of the record that there was no jurisdiction, as in the "Utah" decrees, and most of the old "Indiana" decrees; the suit would be readily defeated in this showing. But if the record itself showed jurisdiction, then the party should plead that the court did not have jurisdiction, and offer oral evidence to prove it. Records generally import absolute verity. Such is the rule, but in divorce cases, one may impeach the record as to the jurisdiction of the parties, and show by evidence *aliunde*, that the parties were not within the rightful jurisdiction of the court. Such decrees are simple nullities, and may be attacked either by direct proceedings to have them declared void, or may be attacked collaterally whenever they

[1] 7 Dana, 183.

arise in any court, in any way, between any parties. A court will not, of itself, take any notice of a void decree. It can only act when, in any proceeding, a reliance is placed on such decree, or it is brought up for avoidance. Then the court will be sedulous and willing to annul it, or declare it to be void.

The "Utah" divorces were much more abundant than even the "Indiana" divorces had been, but they soon began to come under review in courts of other States. Wives frequently found themselves divorced without their knowledge, in any way. Sometimes they acquiesced, and sometimes rebelled, but whenever they brought the "Utah" divorce to a test it was overthrown, even in Utah itself, but, in the latter case, solely on the ground that no such authority could be vested in a Probate court, the parties both being domiciled in the territory.[1]

Where neither party has even a residence within the State, the courts of the State resorted to will refuse to entertain suit for divorce, unless authorized and required by statute, and such decree, where authorized by statute, will have no effect beyond the State, even though both parties appeared and submitted to the jurisdiction.[2]

This doctrine is uncontroverted in every case where the plaintiff has gone from the State of his domicil into the State of the forum, to avoid the laws of his or her own State, and obtain a divorce by the laws of the other State, though the defendant appeared.[3] And it may be shown that no *bona fide* residence had been acquired in the State of the divorce.[4] Whether the decree would be invalid where there was no fraudulent purpose in the departure is not clear. But it would be strong presumptive evidence of fraud, if and provided the parties returned immediately to the *domicil*.[5] All courts lay down the proposition broadly that no valid divorce can be had in another State between non-residents. Many

[1] 19 Kan., 451. 19 Neb., 706. 136 Mass., 328. Cast vs. Cast. 1 Utah, 112. 54 Ia., 429. 56 Ind., 263. 13 Bush., 318. 13 Hun., 414. [2] 31 N. J. Eq., 194. 54 Me., 365. 37 Ohio St., 317. [3] 13 Gray, 209. 2 Gray, 367. 6 Gray, 157. [4] 122 Mass., 156. [5] 129 Mass., 14.

recent cases of Dakota divorces, involving sensational features, can be recollected recently, as that of "Blaine vs. Blaine," when both parties at once resumed their domicils, after the decree of divorce. As a rule, the husband has the selection of the domicil, and the wife must take up her abode where he chooses,[1] but for purposes of suing for a divorce, the wife may sometimes acquire a separate domicil, as when he has deserted her and gone to another State, or where, for any reason, it is either improper or unsafe to live with him.

The following is a summary of the law as to jurisdiction:

(1.) In cases where a civil contract would be annulled by a chancery court for fraud, accident, error, mistake, duress or coercion, on general chancery principles: so in like manner the marriage contract may be annulled without reference to divorce law.

(2.) But where there is a statutory divorce law which provides for the annulment of marriage for such reasons; that law, and not the general chancery practice, should be pursued. *Expressio unius exclusio alterius.*

(3.) If a court has no jurisdiction over divorce by express statute law, it can take no cognizance of divorce matters at all, and if it does so in form, its action will be *ultra vires* and void in every sense, and a nullity.

(4.) If a court which is entrusted with authority over divorce, acts beyond the power conferred, as if a New York court should grant a divorce for desertion, it is questionable if it would be *void* or erroneous; but probably *void.*

(5.) If a decree is strictly void by reason that the court had no power to render it, it is a nullity and can be so urged by any one anywhere, directly or collaterally. And if any one acts on the faith of its validity it will not protect him. A party who marries, relying on it, commits bigamy. An officer who seizes property by virtue of such a decree, commits trespass.

[1] 37 Ohio St., 347.

(6.) A decree which is merely erroneous, can only be corrected by the direct parties to it, by writ of error, appeal, bill in the same court to impeach, or other direct proceeding. But third persons affected by it can take advantage of it collaterally in any suit where it is attempted to be used against them. The same principle will obtain in case of fraud.

(7.) A fraudulent decree will not be *prima facie* bad, unless the fraud is patent on its face (as a Utah decree, which on its face showed no jurisdiction of the persons), but the fraud may be shown by the party interested, and the decree annulled; provided, he did not participate in the fraud.

(8.) But a fraudulent decree in which both parties participated and where the fraud is not apparent on the face of the decree, cannot be attacked by either party, but its force as against third persons interested may be averted in any collateral action in which it is raised against them.

(9.) A mere intermeddler or intruder, having no interest, cannot attack any decree, whether void, voidable, fraudulent or a nullity. He has no standing in court.

(10.) A divorce valid by the law of the State where granted is valid everywhere, provided the court had jurisdiction of the parties.

(11.) A court cannot have jurisdiction of the parties, unless one of them was permanently domiciled *animo manendi* in that State.

(12.) Whether a divorce rendered by a court, without the presence of the defendant in court, or actual legal notice to him, served within the State of the forum, is valid, or not, outside of the State where rendered, is unsettled. Some States decide one way, and some the other.

(13.) If a party leaves the State of his domicil and procures a divorce in another State, it will be void in the State or his *domicil.*

(14.) If a decree of divorce is granted upon actual appearance of defendant, or legal notice to him in the State

of the forum, and an allowance of alimony and custody of children is also made, such decree can be enforced in another State, and the husband compelled to pay the alimony, like any debt. But the law as to imprisonment for debt, for contempt and exemption, will be, not the law of the divorce forum, but the law of the State where it is to be enforced.

(15.) In case of a divorce in one State and the attempt to admeasure dower or to acquire a tenancy by the curtesy in another State is made, the law of the State where the real estate involved is situated, governs as to dower and curtesy.

(16.) Children of divorced parties cannot by a direct proceeding interfere in a suit, either while it is *in fieri* or after a decree, but they may claim heirship or property rights and may have them enforced, and may show collaterally that the decree was fraudulent or void.

(17.) It is competent for persons to change their domicil, and if changed *bona fide*, *animo manendi*, it is an effectual domicil for divorce proceedings, and in such case the law of that domicil would govern in a divorce proceeding, regardless of the place of a former domicil, or of the celebration of the marriage.

(18.) Persons whose business is ambulatory, may fix their domicil where they may choose, and it will be observed by courts, but they must actually be at the place named at the commencement of so claiming it as a domicil. A mere intent is not, alone, sufficient. There must also be a physical residence, although the party may be absent from it, as his business or pleasure may require.

(19.) Each State or nation has control of the marital *status* of its citizens while they are within its borders, and may prescribe conditions relevant thereto, which will be enforced while they are within their limits.

(20.) Full faith and credit must be given in every State of our Union to the decree of divorce rendered in another State, but the State may inquire if the State of the former had jurisdiction, and may decide that question for itself.

XXXI.

THE PARTIES.

A divorce rendered by a court which had no jurisdiction over the subject matter, is a mere nullity, and may be pleaded or proven in any proceeding, either direct or collateral, either by a party or by a stranger to the record.[1] Where the jurisdiction does not exist, it is a usurpation of power to act, and the so-called acts of the tribunal are of none effect, and maybe so treated in any collateral proceeding.[2] In a case in Pennsylvania, a stranger to the record attempted to show that the court had no jurisdiction in the tribunal itself; but the court overruled the objection, saying: "Here the court was one of general jurisdiction. To it belonged the *subject* of divorce, and it had jurisdiction of the parties. It could only be attacked for error by a direct proceeding, and not collaterally."[3] When there is jurisdiction of the parties and of the subject-matter, the decree is never *void*, but only *voidable*, when irregular.[4] If one of the parties to a suit deems the decree to be voidable or erroneous, he can only take advantage of it on appeal, writ of error or bill of review, or bill in the nature of a bill of review; but the attack *must* be direct, and can never be collateral: until the decree is reversed, set aside, or modified he is bound by it; but other parties than the direct parties to the suit may be injured or affected in their property or other rights by the decree, and may claim that it is fraudulent or erroneous. In such case they cannot disturb the decree, but may avoid its force as to them by an attack collaterally; *i. e.*,

[1] 74 Iowa, 92. 9 Ga., 130. 11 N. H., 191. [2] 4 Tex., 391. 10 Pet., 449. 10 Cas,, 489.
[3] 40 Pa. St., 155. [4] 10 Pet., 449. 10 Cas., 489.

without trenching on the decree itself they may avoid its effect upon them by showing its fraudulent or erroneous character, by proof *aliunde*. But no one can question a decree except a party to it, or some one whose rights are impaired by it. A parent applied to court to annul decree of a divorce to which his son was a party: *held*, that he had no standing in court to justify it.[1]

While it is quite true that fraud vitiates everything, it is equally true that no one can complain except he be injured. He must establish a special injury to himself. An alleged fraudulent decree will not be judicially scrutinized on application of any outside party unless his right be affected, and then not by a direct, but by a collateral, proceeding, or a collateral inquiry or investigation in a pending suit. The leading case is thus: "The defendant gave in evidence her marriage with one M. Plaintiff showed a sentence in the ecclesiastical court, and the charge: For that at the time of solemnizing it, defendant was married to D., which the plaintiff's counsel relied on as conclusive evidence of the nullity of such pretended marriage with M., and so it was agreed, unless the defendant might be permitted to show fraud in obtaining the sentence, and to avoid it by restriction of fraud. The court took a distinction between the case of a stranger who cannot come in and reverse the judgment, and therefore must, of necessity, be permitted to aver that it is fraudulent, and the case of one who is a party to the proceeding. If *he* (the party) pleads the judgment was fraudulent, he cannot give evidence of it, but must apply to the court which pronounced the sentence, to vacate the judgment, and if both parties colluded it was never known that either of them could vacate it. The defendant in this case was a party to the suit, and cannot have redress here."[2]

There is an emphatic distinction between no jurisdiction in the tribunal and a decree obtained by fraud. In the former case any person may attack the decree in any way he

[1] 2 Stock., 21. 32 Hun., 551. 85 N. Y., 483. [2] Amb., 763.

may choose; but if the court had jurisdiction, no matter how great the fraud or error, an intermeddler will not be heard in court.

When both parties participate in the fraud, neither can be heard to attack it in any way. Suppose both parties agree to a fraudulent divorce, and afterward one desires to annul it by reason of the fraud. He will not be heard; if he avers his own share in the fraud, his bill will be demurrable. If it be raised (and proved) by plea, his bill will be dismissed. But when a decree is to be attacked for fraud, it must be done in apt season, for an unreasonable delay *after the facts are known*, will be fatal.[1] When a case is *in fieri*, an objection to the jurisdiction may be urged at any time and in any way. A motion to dismiss for want of jurisdiction is always in order.[2] A court cannot hold jurisdiction without having gained jurisdiction of the parties in some way provided by law.[3]

It has been held that a verdict in a divorce proceeding, rendered on insufficient or perjured evidence, or erroneous instructions from the court, is not fraudulent.

A stranger to a judgment may always show that it was obtained by fraud. His proper remedy for avoiding it is in chancery. It is a subject of which chancery has original jurisdiction. No relief can be had against a void contract when the defence should have been made at law, but if the judgment itself is void, that is different.[4] In a case in Iowa, a wife got a divorce in Iowa, and the husband in New York afterward got a divorce there, then tried to have the Iowa decree annulled. *Refused*, because he had ceased by the New York decree to be her husband and was adjudged to be an intermeddler.[5] Nor can the second husband of a woman attack her decree of divorce from her first husband.[6] In Vermont it is held that strangers and third persons, when the judgment of a court of record is

[1] 120 Ill., 377. 113 Ind., 131. 60 Wis., 200. [2] 10 C. E. Greene, 60. [3] 4 Gilm., 133. [4] 10 S. & M., 295. [5] 54 Iowa, 153. [6] 85 N. Y., 483.

relied on against them, may show it to be fraudulent by evidence to the jury.[1]

I annex a few authorities designed as a commentary on the above views. The same principles appear elsewhere.

A judgment of divorce obtained by fraud or ill-practice against a spouse absent from the State will be annulled. [2] Court will set aside its decree of divorce, fraudulently obtained, on a pretended service, and this even though the libellant has married again. [3] If husband or wife goes to another State merely to obtain a divorce, not designing to permanently reside there, such divorce will be void. [4] If a citizen remove to another State to obtain a divorce on a ground which would not in the former State support a decree, and then returns, the decree by him so obtained, is of no effect. [5] When a resident of New York, having a wife who also resides here, goes to another State and, in a suit brought there, obtains a decree of divorce, without any service upon or notice to, her, or any appearance by her, such decree is void. [6] When a decree of divorce is annulled, the parties are restored to their previous condition of wedlock, even though one or both have married again and children have been born to them. [7]

One who would vacate a decree of divorce obtained by fraud, must act promptly. Many years' acquiescence after the discovery of the fraud, the party obtaining the divorce having married again, will bar relief. [8]

In Delaware, Massachusetts and Maine it is provided by law, that, where any of their citizens shall resort to another State to obtain a divorce for any cause occurring within the State, or for a cause which would not allow a decree by the laws of the State, a divorce so obtained shall be of no force or effect in the State. [9] In Indiana it is enacted that "a divorce, decreed in any other State by a court having jurisdiction thereof, shall have full effect in that State."

[1] 1 2 Vt., 619. [2] 36 La. An., 808. [3] 62 Tex., 337. 91 Ind., 27. [4] 3 Lea., 260. 122 Mass., 156. [5] 10 Mass., 260. 6 Gray, 157. [6] 31 Barbour, 69. [7] 23 Kan., 262. 46 N. J., Eq. 411. 19 Amer. Dec., 172. [8] 91 Ind., 27. [9] Rev. Stat. of Del., 1874. Rev. Stat. of Maine, 1883. Pub. Statutes, 1882, Mass.

XXXIII.

OF THE RESIDENCE REQUIRED.

I elsewhere show that a party can not acquire a genuine divorce out of the State or Territory where he has his *domicil*, but it is a further requirement, that he must have had a certain length or term of residence in this *domicil*, to entitle him to use the court to sunder the union.

Both time and intent must concur: i. e., a party must not only have lived a certain time, prescribed by law, in a State, but must hold that State as a permanent residence, *animo manendi*, to authorize a divorce that will stand. Many government clerks in Washington city go *home* to the States they came from, to vote; they are indeed *residents* of Washington, but their domicils are in the States they came from, and, if they wanted divorces, they could not be obtained in Washington, but in their *domicil* States. A citizen of Missouri perhaps, goes to California and engages in business and remains over a year, but with no intention of remaining there. He is indeed a resident of California, and for the requisite time, but his forum for divorce objects, remains in Missouri. A citizen of New York goes to Dakota on temporary business, as to hunt, lend money, speculate or get a "lightning" divorce, with no intention to stay beyond the time of completion of his temporary business. He may indeed stay there for the ninety days prescribed, but, his domicil remaining in New York, he could acquire no valid divorce in Dakota. He must have the following prescribed requisites: 1st. He must have resided in the State for

the requisite time; 2d. He must have the *animo manendi*; 3d. His residence must also be *bona fide*.

Subject to the qualifications, conditions and exceptions which will be hereinafter noted, the following periods of residence are required by statute before suit can be brought: South Dakota and North Dakota, *ninety days*.

Arizona, California, Idaho, Nebraska, Nevada, New Mexico, Texas and Wyoming, *six months*.

Alabama, Arkansas, Colorado, Illinois, Iowa, Kansas, Kentucky, Michigan, Minnesota, Missouri, Mississippi, Montana, New Hampshire, Ohio, Oregon, Pennsylvania, Rhode Island, Utah, Virginia, West Virginia, Washington, and Wisconsin, *one year*.

Florida, Indiana, Maryland, North Carolina, Tennessee, Vermont and District of Columbia, two years; Connecticut, three years.

In *Alabama*, it is only when the defendant is a non-resident that one year's residence of plaintiff is required; but if the ground of divorce is *abandonment*, the plaintiff must have been a *bona fide* resident for three years.

In *Arkansas*, if the cause arose out of the State, the plaintiff must have been a resident of Arkansas when the cause arose or existed "unless it was also a cause for divorce in the place where it arose or existed."

In *Colorado*: the residence is required "unless the offence or injury complained of, was committed in the State, or while one or both of the parties reside in the State."

In *Connecticut*: three years' residence required, unless the cause for action shall have arisen subsequent to the removal into the State, or unless the defendant shall have continuously resided in the State three years next preceding the date of complaint, and actual service shall have been made upon him, or unless the alleged cause is habitual intemperance or intolerable cruelty, and the plaintiff reside in the State at the time of the marriage, and before filing the com-

plaint, has returned to the State, with the intention of permanently remaining.

In the *District of Columbia*: no time is prescribed when the cause of action occurred within the District.

In *Illinois*: the prescribed residence is required, "unless the offence or injury complained of was committed in the State, or while one or both of the parties resided in the State.

In *Indiana*: the plaintiff likewise must have resided in the county at least six months before filing the bill.

In *Iowa*: no length of time is prescribed, where the defendant is a resident of the State and served by personal service; nor will any divorce be granted when it appears that the plaintiff has removed into the State for the purpose of obtaining the divorce.

In *Kentucky*: the requirement is the same as in Arkansas.

In *Maine*: no statutory residence is required when the parties were married in the State or cohabited there after marriage; in all other cases, the plaintiff must have resided in the State when the cause of divorce accrued, or must have resided in the State in good faith for one year prior to the commencement of proceedings.

In *Maryland:* no residence is prescribed, unless the cause of action accrued beyond the State.

In *Massachusetts:* five years' residence of plaintiff is required, but if the parties were residents of the State at the time of marriage, and the plaintiff had been a resident for three years prior to the filing of the bill, unless it appears that the plaintiff removed to the State in order to procure a divorce. "Except as above provided no divorce shall be decreed if the parties never lived together in the State as husband and wife, nor for a cause occurring out of the State, unless before such cause occurred the parties lived together in the State as husband and wife, and one of them lived in the State where the cause for divorce occurred."

In *Michigan:* if the marriage was solemnized in the State,

it is sufficient if the plaintiff has resided in the State from the time of marriage to the time of the institution of the suit; and when the cause accrued out of the State the plaintiff or the defendant must have resided in the State for two years next preceding the commencement of the suit.

In *Minnesota*: no time of residence is prescribed where the cause is for adultery committed while the plaintiff was a resident of the State.

In *Mississippi:* two years' residence is required for desertion, and the plaintiff must also annex to the bill an affidavit that he has not taken up residence in the State in order to obtain a divorce.

In *Missouri:* the statute is the same as in Illinois.

In *Montana*: the statute is the same as in Illinois.

In *Nebraska*: in case the marriage was solemnized in the State, it is sufficient if the plaintiff has resided in the State from the time of the marriage to the time of the filing of the complaint.

In *Nevada:* the plaintiff must have resided six months in the *county* in which suit is brought, unless suit be brought in the county in which the cause therefor accrued, or in which the defendant shall reside, if the latter be the county in which the parties cohabited.

In *New Hampshire:* both parties must be domiciled in the State when action is commenced, or the plaintiff must be so domiciled, and the defendant personally served with process within the State, or one of the parties must be so domiciled when action is commenced, and the one or the other of them must have actually resided in the State for one year next preceding the commencement of action.

In *New Jersey*: jurisdiction is had if either of the parties is an inhabitant of the State at the time of the injury, desertion or neglect complained of, or where the marriage shall have occurred within the State, and the plaintiff shall have been an actual resident of the State at the time of the injury, desertion or neglect complained of, and at the time of exhib-

iting the bill, or, if on the ground of adultery committed within the State, where either of the parties reside in the State at the time of exhibiting the bill, or, if by reason of adultery committed outside the State, where either of the parties shall have been a resident of the State for three years next preceding the time of exhibiting the bill, or, if on the ground of desertion, when the plaintiff or the defendant shall be a resident of the State at the time of exhibiting the bill, and either party shall have been a resident of the State for the term of three years, during which such desertion shall have continued.

In *New York*: for full divorce, both plaintiff and defendant must have resided in the State when the offence was committed, or must have been married in the State, or the plaintiff must have been a resident when the offence was committed, and also when the action was commenced, or the offence must have been committed within the State, and the plaintiff must be a resident of the State when the action is commenced. In action for limited divorce, both parties must have been residents when the action is commenced, or must have been married in the State, or, if married out of the State, they must have become residents thereof, and continued to be such at least one year, and the plaintiff must be a resident when the action is commenced.

In *North Carolina*: the plaintiff must set forth that the facts constituting the cause for divorce have existed to his or her knowledge for at least six months prior to filing of the complaint; if the wife be plaintiff, she may state "that the defendant is removing, or about to remove, his property and effects from the State, whereby she may be disappointed in her alimony."

In *Texas* the plaintiff must have resided in the county for six months prior to filing of bill.

In *Vermont:* "no divorce shall be allowed for any cause if the parties never lived together as husband and wife, within this State, nor for a cause which accrued in another State or country, unless the parties before such cause accrued lived to-

gether as husband and wife in this State; nor for a cause which accrued in another State or country, unless one of the parties then lived in this State. In an action on the ground of adultery, intolerable severity or wilful desertion, when the cause of the action accrued without the State, the plaintiff shall have been an inhabitant of the State for two years next preceding the filing of the complaint, and of the county where the complaint is filed, for one year next previous to the term of court where suit is brought."

In *Virginia* and *West Virginia either* plaintiff or defendant must have resided in the State for one year, etc.

In *Wisconsin*, when the adultery charged was committed while the plaintiff was a resident of the State, or in case the marriage was solemnized in the State, it suffices if the plaintiff resided in the State from the date of the marriage to the time of bringing suit. When the wife is plaintiff, it is sufficient that the defendant had resided in the State for one year prior to commencement of suit.

In *Wyoming* it suffices, if the marriage was solemnized there, if the plaintiff has resided there from the date of the marriage to the commencement of the suit.

In California, the Dakotas, Idaho, Kansas, Nebraska, New York, Ohio and Wyoming, when a married woman brings suit, *her* domicil is held good, regardless of the husband's domicil.

XXXIII.

THE LAW OF PLACE.

That which I may term the law of *place*, although generally commented on in connection with other subjects at their proper titles, may be still further elucidated.

It may be considered under the following sub-titles:

(1). The *jus gentium*, the place of the party's nativity.

(2). The *lex loci domicilii*, the place of the domicil.

(3). The *lex loci contractus*, the place where the contract of marriage was celebrated.

(4). The *lex loci delictus*, the place where the matrimonial offense was committed.

(5). The *lex fori*, the law of the place where the suit is brought.

(6). The *lex loci rei sitae*, the place where the property is situated.

In some countries laws are prescribed regulating their citizens' matrimonial conduct, as that they shall not marry any but a subject of their own land, or shall be married in a certain way, or that a marriage between a subject of that country and of any other country shall be null and void, or that they must have a license from the king before they can marry. I have cited at length a case which arose in the Superior court of Cook county, where one Roth, a subject of the king of Wurtemberg, had married in Chicago, been divorced in Wurtemberg, and married again. By the law of Wurtemberg a license from the king was required. Court held that the Illinois marriage was good, despite the requirements of the native country, that such law had no extra-ter-

ritorial force as to marriage, but that the Wurtemberg divorce was pleadable in bar in Chicago in an action of the first wife to administer on the husband's estate, lying in Cook county.[1] The principle there enunciated was, that the law of the place of nativity had no extra-territorial application in any other jurisdiction, and such is believed to be the international law.

The law of the person's domicil governs in cases of the contractual ability of the parties to marry, or of divorce, or nullity of contract; and not only does the law itself govern; but it must likewise be enforced there. A citizen of New York could not get a valid divorce in Colorado or Dakota, even though he should allege and prove adultery. That is a sufficient cause in New York, but it would be quite as spurious if enforced out of New York as if decreed for a cause not good in New York. Nor would a decree obtained in a place of temporary sojourn be availing anywhere else, or even there, if the fact was shown that it was only his temporary, and not the permanent, domicil.

There are many persons who obtain clerkships in Washington with a view to hold them as long as they can, and when they are bereft of their positions, design to return to the State of their *domicil*. They even keep up their voting privilege in the State of their *domicil*. Such persons have no right to get a divorce in Washington, even though they remain in the public service there for forty years. Of course it is competent for them to discard the State of their *domicil*, as a further domicil, and assume Washington: and from the time such design was formed, Washington became their domicil. It is of course competent for a citizen of another State to remove to Dakota with a view to a permanent residence, and in such event they might acquire a domicil for all purposes, divorce included: but to simply go there with the sole design of obtaining a divorce

[1] Roth, 104 Ill., 35.

does not confer a right to a divorce which will be respected or enforced anywhere else.

In case of commercial travelers, actors, lecturers, minstrels, etc., who are "on the road," or at "night stands," or "fortnightly stands," for ten months in the year, it is different. They may adopt any place they may choose as their *domicil*, and if they abide faithfully by one, that will be their domicil. I have noticed that Chicago is a favorite domicil for this class. This probably is because of its central position, and also because the exigencies of their calling require them to be there more frequently than at any other place. Still they may select any other place. I note a leading actress has three several homes. Of course she may select either as a domicil, or may change her *domicil* at will.

But it is only a home from the especial and particular date of the *animus* to make it so. A person cannot *to-day*, or any particular day, say: "This is my home," and at once file a bill for divorce; from the time the party settles in a place and *claims it as a home*, it commences to be a home; or from the time a traveler, a professional minstrel, or a traveling actor, chooses a place as a *home*, from that date it commences, but the legal residence is not complete till the requisite time has elapsed: but the merits of a divorce could not be challenged because the applicant claiming a residence and domicil at the place of obtaining it, never in fact resided there, had no real home there, even did not vote or pay taxes there. It would pass rather by virtue of the negative circumstances that the party had no other home and no other practical domicil, than from the absolute circumstance of the claim of actual domicil.

The exception to the liberty of choice is in case of a married woman, who must follow and abide by the domicil of her husband; and, if she do not do so, it will be desertion. An exception will be where the husband creates a domicil in an entirely unsuitable place, as if he should settle in a place

where her health would be seriously undermined, or, if she was a refined person of delicate rearing, and he should migrate to the trackless deserts of Canada, and live in a hut; or if he attempt to house her in a disreputable place. The rule is to be enforced reasonably. The husband selects, determines the place of, and constructs the home; it is her duty to live there and to keep it in order. If, however, he attempts to locate her in a clearly unsuitable place, or if he performs acts in violation of the marriage covenant, she may then select her domicil, which may be different from his, and may even be in a different State, and she may acquire such different domicil even for purposes of bringing a divorce suit against her husband. In Tennessee it was held that where neither party had a domicil, that the *lex loci contractus* (place of marriage), controlled as to movable property, and that the *lex loci rei sitae* governed as to wife's movables, in connection with her marital rights.

A very important distinction exists in this connection which should not, although it sometimes does, pass unheeded, viz: that while the *lex loci contractus* is to govern and control as to the form and manner of celebration, the *lex domicilii* governs as to the capacity of the parties to contract. For example, if Massachusetts does not allow a man to marry his step-daughter, and New York does; and a citizen of Massachusetts repairs to New York, and there marries his deceased wife's daughter by a former husband, the marriage will be good in the latter State and void in the former. A lady, whose domicil was in New York, recently resorted to Dakota and there procured a divorce from her husband, and at once in Dakota married another man. Such marriage might have been good in Dakota, but would not be good in New York, because, the divorce being a nullity in New York, she was not competent to contract a second marriage, being still the wife of the first husband.[1] Suppose that by the law of New York, first cousins cannot marry, and persons of such

[1] 76 N. Y., 78.

consanguinity resort to New Jersey, where no such prohibition exists, and marry. The marriage is valid in New Jersey but void in New York. Now suppose the parties cohabit together as husband and wife in New York, what consequences follow? They are guilty of adultery merely. But suppose that one of them should remarry another party in New York; it would be no offence there. Then suppose the remarried parties should remove to New Jersey and reside; they would not be guilty of bigamy, because the offence did not occur there, but would be guilty of adultery if they cohabited with the partner of the second alliance. The rule, therefore, is, that so far as the capacity of the parties to contract is concerned, the law of their domicil controls, but in all other respects the place of the contract controls. If parties living in Connecticut, where a ceremony is required, resort to New York, where none is required, and contract a common law marriage, it will be equally good and valid in Connecticut as in New York.

A North Carolina case goes so far as to say that if a person marries two several wives in Turkey, where polygamy is allowed, and brings them back to that State, the laws of North Carolina will recognize the validity of both marriages.

The law of the place of the parties' actual domicil must govern in all questions of divorce, without regard to the law of the place where the marriage was celebrated.[1] In a suit for divorce, *lex domicilii* is to govern the courts in their decision.[2] As to the grounds for granting a divorce, the *lex fori* (or place of suit) governs, and not the law of the place where the marriage occurred.[3] When a resident of New York, having a wife who also resides here, goes to another State, and, in a suit brought there, obtains a decree of divorce without any service of process upon, or notice to her, or any appearance by her, such decree is void.[4] A judgment for alimony, rendered in another State, when the only notice to the defendant was by publication, and he did not appear, and

[1] 19 Ala., 499. 20 Ala., 629. [2] 2 Blackf., 407. [3] 31 Ga., 223. 28 Ala., 12. [4] 31 Barb., 69. 17 How., Pr., 18. 15 Phil., Pa., 403.

the record did not show that he was a resident of that State, held of no force in Indiana.[1] To effect a change of domicil, a new residence must be acquired so permanent as to exclude an existing intention to return to the old one, or to make a domicil elsewhere than at the new place of residence.[2] If either a husband or a wife goes into another State for the purpose of getting a divorce, and with no intention of becoming a permanent resident there, a divorce, if obtained, will be held in Tennessee (and anywhere else) to be null and void.[3] A divorce authorized by the statute of another State, where neither party is domiciled, is of no effect in this State, where they have their domicil.[4] It is competent for the wife to acquire a domicil different from her husband's; and the law on the subject in such case is thus stated:

"When the injured party seeks a new domicil and the domicils are, therefore, actually different, there is no greater reason why the husband's new domicil should prevail over the wife's, than her's should prevail over his. * * By marriage, the wife has claims upon her husband's property here, and the law of Pennsylvania has claims to apply it to her support as one of its married citizens; on what principle of right or of comity shall the decree of a distant tribunal here having acquired jurisdiction from domicil or otherwise over her, cut loose these claims and disable Pennsylvania from taking the property of the husband within her borders, to lift the burden of support from the public shoulders; or from rendering to the wife judicially that right which she has in her husband's property, and which he neither carried away with him nor defeated by his removal? To admit the greater right of the foreign decree is to derogate from our own sovereignty and to withdraw from one of our own citizens the protection due to her. No correct principles of interstate law can demand this."

The place where the marriage was celebrated, governs as to the validity of the marriage, provided the parties have the contractual capacity to marry, and it is monogamous and according to Christian usage. I give example, under head of

[1] 49 Ind., 386. 52 Mich., 117. [2] 58 Conn., 268. [3] 3 Lea, 260. 52 Mich., 117. 13 Phil., Pa., 30. [4] 37 O. S., 317.

"Marriage," which see. A contract of marriage must occur at *a* (and only *one*) place, and at a single moment of time; it cannot be in abeyance or delayed, hence there can be but one *loci contractus*. On principle, although there might be a difficulty in the practice, parties may marry by mail, just as they may make any other contract thus; i. e., a girl in New York may write to a man in Oregon, thus: "In consideration that you will marry me by means of epistolary correspondence by or before December 25th, next, I will marry you at the same time," and the man writes: "I agree to the proposal of your letter of the ——, and will marry you on receipt of this letter." Now if the girl received the letter, say, on December 23d, the contract of marriage would be formed and exist from and after that date, and the place of contract would be New York. But suppose the laws of New York should have required a *ceremonial* marriage, and the laws of Oregon did not? Then the marriage would fail, for the contract could not take place till the moment the female received and read the letter, and it must necessarily take place where she, whose act was the final one which gave effect to the contract, was. When parties are married by a ceremonial marriage the contract is consummate when the bride says "I will," or nods assent, or does not dissent, and, if the clergyman should fall dead in an apopletic fit before he had pronounced them man and wife, the parties would nevertheless be married, except in a few States, where a ceremonial marriage is made indispensable, in which case the whole ceremony must be gone through with; and, although, as is very common in case of a ceremonial marriage, the sexual contact, which is the crown, seal, and essence of marriage, be not had in the same jurisdiction in which the ceremony was performed, yet the *locus* of the marriage was where the formal ceremony was performed In case of a marriage *per verba de presenti*, with no ceremony, although there is some difficulty about it, yet it probably would be at the time and place when and where the actual consent of the parties occurred, and not at

the place where the sexual contact was had; suppose for example, parties agree together in New York to be husband and wife, and then at once go to New Jersey, where the consummation is had: the *locus* of the marriage is in New York, and if valid by that law it is valid in New Jersey, although, we will suppose, that by the laws of New Jersey a common law marriage is invalid; but suppose the parties in New York agree to a marriage *per verba de futuro cum copula*, and go to New Jersey and there consummate it, I am of the opinion that, if in New Jersey a ceremonial marriage is required by law, no marriage took place between the parties, for these reasons, that the parties were not married till they had undergone the sexual embrace, which was had in a State where it could not be marriage, for in such case the time and place of the marriage is the specific moment the sexual embrace is complete, and in the case stated, it was had in a State which allows of no such mode of marriage, and, not being valid there, is valid nowhere.

The incident of Napoleon's second marriage was peculiar, and has already been stated. Intending to meet his affianced at some distance from Paris, he asked his law advisers, if a prince begotten by him of his affianced, before the ceremonial marriage, would be legitimate? They answered, *yes*. I should have made no such answer in so important a matter, and my judgment is that they only thus answered, because it would have been unsafe to have thwarted the Emperor's wish. For, as I understand the laws to be, a child born in wedlock is *presumed* to be legitimate, but in this case it was positive that the Emperor had access to the princess before marriage, and that the child, therefore, might have been illegitimately begotten, and if the bars are once thrown down to the assurance that this heir of so immense an empire might have been illegimately begotten at all, it would have been but one step further to have ventured the possibility that it might have been begotten by another. In short, there should be an absolute precision and sacredness about the article of mar-

riage; there should be no risks and no latitude allowed; in a physical sense, affianced parties should be absolute strangers to each other, till the knot is tied fast and firm.

The *lex loci delictus*, or place where the act was committed, as adultery, cruelty, etc., affords a reason for jurisdiction for divorce in some localities, that is to say, a New York man and wife are traveling, and stop at a hotel in Chicago, and, while there, the man commits adultery; the wife could instantly commence a suit for divorce; even though she remained at home, the case would be the same; she could enter a suit there and get a decree: but would such a decree hold in New York? Evidently not; the Illinois court had jurisdiction on the subject matter, but did not have jurisdiction of the parties. Illinois had a right to vindicate her laws, which were violated, but had no right to meddle with marital status of citizens of another State, and so, despite the Illinois statute, I hold that it had no extra-territorial force.

The place where suit is brought (*lex fori*) governs as to methods of procedure, limitations of action, and all matters connected with the enforcement of the *remedy*; and, when it is desired to rely upon some other law to govern as to the merits, such law must be averred and proved, otherwise the court will presume that the law which is to govern both as to form and substance, will be that of the forum. For example: in one jurisdiction, a jury trial must be had on issues of fact; in another it is optional with the court: and in still another, no jury is allowed. We have all these classes in the United States: or, in one locality, the parties are competent witnesses only as to the fact of the marriage; in another, competent on all matters, and in another, incompetent. The law, or custom, where the court is held, prevails. The *lex loci rei sitae* controls as to the impression to be made upon, and the disposal of, property. This applies especially to the enforcement of alimony or of dower in a jurisdiction other than that where it is granted. To illustrate, suppose that a decree for alimony should be made in Illinois,

where there is a real estate exemption of only one thousand dollars in value, which it was sought to enforce in Kansas, where the exemption was of forty acres and improvements. In such case, although this might be worth many thousands of dollars, yet the alimony decree could not be enforced against it; so as to dower. In Illinois, a wife divorced for her fault loses her dower; but if it was attempted to enforce dower rights in behalf of such a wife in a State where she did not forfeit her dower, the law of the latter State would prevail, and she would recover her dower.

The incidents to a foreign divorce are also naturally to be deduced from the law of the place where it is to be decreed. If valid there, the divorce will have, and ought, in general, to have all the effects, in every other country, upon personal property locally situated there, which are properly attributable to it in the forum where it is decreed. In respect to real or immovable property, the same effects would, in general, be attributed to such divorce as would ordinarily belong to a divorce of the same sort by the *lex loci rei sitae*. If a dissolution of the marriage would then be consequent upon such a divorce, and would there extinguish the right of dower, or of tenancy by the curtesy, according to such local law then the like effects would be attributable to the foreign divorce, which marked a like dissolution of the marriage.[1]

[1] Conf. of Laws, sec. 230 b.

XXXIV.

AN EXPOSITION

OF THE MISCHIEFS AND HAZARDS OF A FRAUDULENT DIVORCE.

Persons of either sex, who find themselves environed with marital ills, are eager to rid themselves of them; which desire is intensified if they have in view a more agreeable and promising alliance. They would *not*

> * * * "rather bear the ills they have
> Than fly to others that they know not of,"

but proceed to procure a formal decree of divorce, with the utmost haste; and deceived, by the assurance of the divorce "*shyster*" with whom they deal, and by the imposing *decree*, adorned with a meretricious seal, which pronounces them divorced, fancy that they are forever released from the crushing matrimonial burden which has heretofore been too grievous to be borne.

In no case or situation, that I am aware of, is there a more imperative need of sound and responsible legal advice than about this matter of divorce. Every person's liberty and reputation is involved, no matter how impecunious they may be, and, when they have property, that also is at stake. A person can no more afford to be reckless in this matter than in any other vital interest, and is no more authorized to solicit or act upon the advice of a "*shyster*" in this matter than any other legal matter which might affect their life or fortune. It is strange that persons will go to a disreputable "*shyster*," and obtain a fraudulent and void divorce, who would not entrust such a person with even a ten dollar property law-suit. I repeat, that the most important litiga-

tion or resort to the law that one can have, is a divorce proceeding; and none but the best legal advice should be sought or relied on, in the premises. In all other legal matters, persons rely upon the law of their domicil to conserve and adjust their personal and property rights. They execute their *wills*, make contracts, transact business, create and execute trusts, by the law of the place where they prefer to reside, but, when they desire a divorce, they take a trip to Chicago or Dakota, and return home with the coveted document. This is a solecism in human conduct wholly unexplainable by any moral or logical rule. They have been known to trust their dearest interests to a disreputable "*shyster*," whom they would not trust to get a favorite dog released from a pound.

Modern *divorce* methods have been in vogue and on trial now for over forty years, and, for practical objects, the law is no wise in doubt, and, from the settled law, I deduce the following rules:

(1.) A divorce or sentence of nullity of marriage procured in the domicil of the parties, and *valid* there, is valid everywhere.

(2.) A divorce or decree of nullity of marriage procured in another jurisdiction than that of the parties' *domicil*, for a cause which did not arise or accrue in the *lex fori*, is *void* everywhere else except in the *lex fori* (place of action), and sometimes void there.

(3.) A person's domicil is "the established, fixed, permanent or ordinary dwelling-place, or place of residence, of a person, as distinguished from his temporary and transient, although actual place, of residence. It is his legal residence, as distinguished from his temporary place of abode; or his home, as distinguished from a place to which business or pleasure may temporarily call him."

Consequently, a person who leaves the place of his or her domicil, and takes up his or her temporary residence in another State, in order to, and does in fact, procure a divorce

in the new domicil, and returns to the old domicil, or to another new domicil, perpetrates a fraud, and his alleged divorce, if brought to a strict judicial test, will, or should be, adjudged void in every State except that of the *lex fori*. These spurious divorces (so called) came into being forty years ago, when, by the law of Indiana, a divorce was authorized for "incompatibility of temper" between the marital parties: and by the accommodating spirit of the courts, actual residence was dispensed with, and an application for divorce, was tantamount to a decree therefor. According to the practice in vogue there, the decrees recited that the parties were present in court when the suit was heard, and decree made: but courts of other jurisdictions asserted a right to call such recitals in question, and decide on proofs *aliunde* if the divorce court had, in fact, *bona fide* jurisdiction, and when it was found that the parties had resorted to Indiana, merely for the purpose of acquiring a domicil for divorce objects, such alleged jurisdiction was challenged, and the alleged divorce or sentence of nullity overthrown. And in accordance with this settled practice of courts, I deduce the following rule: Any court, in which a decree of divorce granted by another jurisdiction is pleaded, is not bound by the recital of the jurisdictional facts, but may receive proof thereof, and it may be shown by evidence *aliunde* that the domicil of the parties was not in the *lex fori*, and that the decree pleaded was obtained by means of fraud or gross abuse of the process of the court, or without *bona fide* jurisdiction of the parties, or by flagrant departure from the ordinary course of judicial procedure; and, in such case, the decree of divorce will be adjudged void, and the parties may be proceeded against as if no divorce (so called) had been had.[1]

After the course of practice under the Indiana divorce law had sufficiently disgraced and brought odium on the State, the law was repealed; and the next jurisdiction for flagi-

[1] 25 Mich., 247. 56 Ind., 263. 25 Minn., 29. 13 Bush., 318. 13 Hun., 414. 46 Iowa, 437. 19 Kan., 451. 108 N. Y., 628. 76 N. Y., 78.

tious divorces was Chicago, not by reason of the law itself being very favorable, but by reason of the lax administration of it, the practice being to refer cases to a master and report, which was rarely unfavorable, and whose report was always confirmed. The judges abolished this practice, by reason of the inherent abuses, and required a hearing in court, and the evidence to be preserved in the record: and with those precautions and the good faith of the judges, *bona fide* divorces are obtained there now, as in other jurisdictions.

The most disgraceful evasion and violation of good faith in the operations and practice of divorce law, was the practice which obtained in Utah for some ten years. All that was needful to secure a decree, was to make an affidavit that one wished to become a resident of Utah, and to secure two other affidavits to the effect, that he or she could not get along in peace and harmony at home. And the decree was entered up in any county in that polygamous State, and a certified copy furnished the applicant, for which the minimum charge was one hundred dollars. With the advent of a Gentile population, consequent on the introduction of railways and mining operations, and the decline of polygamy; this divorce law grew in disfavor, and was repealed. Several convictions of bigamy visited upon adventurous spirits who, shielded by the palladium of an "Utah" divorce, ventured their necks into the matrimonial noose a second time, accelerated this movement. And a necessity for another jurisdiction for "lightning" divorces accrued, and Dakota, then a widely expanded territory of scanty resources and trifling and unremunerative litigation, thrust itself into the breach, and has of late maintained large divorce colonies, and has achieved an unsavory reputation and considerable wealth by its facile morals and flagitious practices in the divorce line.

The decrees of these courts are of the same kind as respects inefficacy, as the "Indiana" and "Utah" decrees, and will not stand the test of moral propriety or judicial fitness anywhere: and thus, whenever a test of them is made,

they will be easily overthrown. Parties frequently marry a second time, by virtue of the shield of a Dakota decree; but it is no shield. The parties may never be indicted for bigamy, and, if not, they may live their lives throughout, "unwhipt of justice." So also they might do just the same, without the nominal palladium of a Dakota divorce. Bigamy is harmless, unless courts act on the case, whether there is, or is not a "Dakota" divorce. And the reason why no more *mal*-effects are visible as a result of these divorces is, that generally both parties desire the divorce, and no one is interested to enforce the criminal law; and, as I state elsewhere, (1st) when both parties participated in the frauduent divorce, neither can be heard to question its validity; and (2nd) the *laches* of the party in applying to annul the fraudulent decree will be fatal in due course of time; hence, so few of these decrees are challenged; and (3rd) as to the parties concerned, these decrees are good, unless attacked directly by appeal, writ of error, or bill of review, or to annul for fraud; and in the latter case, as I have said, the attacking party must not be complicated in the fraud. From the above it will appear that extraneous circumstances alone save parties from the consequences of their delinquency in many cases: to which may be added, that the practice in Dakota is probably favorable to preventing flaws from inhering in their work, and save them in other cases. Thus, however fraudulent the case may be, and although the defendant may file a plea to the jurisdiction under oath, and which in no other jurisdiction would need the personal presence of the defendant, yet does in this jurisdiction, by an unwarranted abuse of judicial discretion, demand the presence of the defendant. So long as neither divorced party marries again, or does not commit adultery, they are safe, but if either one attempts to marry again, they are at the mercy of the State's attorney or grand jury of the *lex loci contractus* (of the marriage only), and may be indicted and imprisoned for the crime of bigamy.

Another danger is apprehensible from another and an un-

expected source; viz.: that the children and heirs-at-law of the union which was terminated by the fraudulent "Indiana," "Utah," or "Dakota" divorce, will, upon or after the death of the parents, demand their rights, as heirs-at-law. In the case stated, the children are not affected by the fraudulent decree; it does not bind or conclude them, and they are as much heirs after the decree as before; at the death of their parent they therefore, can assert their rights in his estate as heirs-at-law. Suppose, however, the parent has married again and has children of the second marriage? As fraud vitiates everything, this fraudulent decree is a nullity as to them, and the second heirs would not be allowed to defeat the rights of the heirs of the first marriage; but the most extreme consequence would be to multiply heirs and allow all to participate, as if the first wife had died instead of being divorced. There are estates in this country, today, in the wrong hands, by reason of ignorance of this law.

There is this, and this only, difference between the "Utah" decrees and the "Dakota" decrees: the former are spurious on their face, and need no extraneous proof; the latter may be valid on their face in some cases (as when both parties appear) and would need proof to overcome them. The proof, however, would not be difficult or abstruse; it would simply be that the party was domiciled in a State other than at Dakota, except for the few months occupied in getting the divorce. A Mrs. D——— applied to me in Chicago to collect a large number of promissory notes made by her husband for the sum of $25.00 each; they had previously together agreed that the wife should get an "Utah" divorce at the husband's expense, which had been done, and as part of the agreement, the husband had given her his notes to an aggregate amount of $1,000, which he had unwisely declined to pay, and had married again. I filed a bill for separate maintenance and exhibited this "Utah" decree as part thereof, when he woke up to his danger, viz.: the wronged wife was his only legal wife, and that he had committed bigamy. And there are

thousands of bigamists in our country today, relying upon the gossamer thread of an "Utah" or a "Dakota" divorce for protection, but whose real and only protection is the mutual guilt of both parties, or the lenity of the innocent one. But children are *in esse* who will assert their genuine claims to the estates of their fathers and mothers, in spite of these fraudulent decrees.

I may here refer to the "Danforth" case, which happened in Illinois; that was a fraudulent divorce, in which both parties participated, and, by virtue of the collusion of the parties, the wife secured $29,000 in cash in the first instance as a result of the collusion, and, immediately thereafter, had the decree set aside and took as his widow, and swept away the estate, worth several hundred thousand dollars: for under the law in Illinois, when there is no issue of a marriage, the widow acquires all the personal property and half the realty, nor can a husband deprive her of either by a will.

Another danger of a peculiar kind, menaces offenders against the laws of marital propriety: it is the exposing themselves to the *status* and responsibility of a common law marriage, when they do not so intend. A common law marriage is as valid and binding as a ceremonial, or a formal, contractual one, and the wife and children of such a marriage have as secure status, both personally, and as to property rights, as any. There are many rich, but feeble-minded, young men running at large, and they are liable to become the prey of designing adventuresses, either by an irrevocable knot, else through the seductive wiles of a looser, but still equally effectual, tie. As I write this, a young South American languishes in the Ludlow street jail, at the instance of one of these alleged wives, whom he attempted to abandon. The case of Bowman, 24 Ill. App., p. 165, illustrates the subject. Bowman was a shrewd, married lawyer of St. Louis, who conceived a fondness for a pretty girl, one Ida Clement, and entered into illicit relations with, and had two children by her, and then sent her to Chicago to live till he could

secure a divorce from his first wife. He secured the divorce, but, instead of marrying this betrayed girl, married still another. This girl then sued for a divorce, claiming a common law marriage, and on a motion for temporary alimony, the court held such marriage to be good.

The case of Mrs. Gaines is equally in point. Some feeble evidence tending to show a ceremonial marriage was adduced, but the strong point in the case was, that she was acknowledged by Clark to be his daughter.

Cases are arising every few days which bring to the criticism of public opinion these "Dakota" divorces, for the titled and wealthy, equally with the obscure, resort to that jurisdiction. The recent case of Chas. E. Powers, of Boston, is in point. He secured a divorce in Colorado, some years since, and recently died, leaving a will in which it was stated that he devised to his dear friend and amanuensis, Fanny Sprague, $900 a year, and, in certain contingencies, $10,000, and in other contingencies $12,000 more, and to his divorced wife, in lieu of dower, homestead and other rights, $300 a year; and it is said that the widow has gone to Colorado to try to set it aside; and if she does, it is a question if she will be reinstated in the same rights as if there had been no divorce. My comments on this case as stated, are: (1st) If Mrs. Powers appeared in the Colorado suit, she cannot vacate the decree; (2nd) If a long time has elapsed since she knew of it, she cannot; (3d) If she can get a hearing, she can set aside the decree easily; (4th) If she does set it aside, she will be restored to the same rights as if she had not been divorced, whatever they may be, dower, homestead, etc.; (5th) But the bequest to Miss Sprague will stand.

In Mme. De Stuers' case, just now on the *tapis*, and where she, a citizen of either New York or Paris, got a "lightning" divorce in Dakota, with custody of her child, now in custody of the husband in Paris, and then, in Dakota, married another husband, while the husband got a limited divorce in Holland, the country of his domicil, together with custody of the chil-

dren, and an annulment of the Dakota divorce, the only infirmity in the Dakota divorce as to him is his appearance, and the only infirmity in the Holland case as to him, is want of actual legal service in Holland on his wife. Were it not for the first defect, the Dakota divorce would be of no force; and were it not for the second defect, the Holland divorce would be good. But, on the general outcome, the Dakota divorce is of no force as far as the recovery of the child is concerned, and the Holland divorce is good except as to annulling the Dakota divorce; it only annuls it so far as Holland is concerned. The Baroness will not get her child in Paris. The Baron will retain its custody both by the general law of the domestic relations, and by the superadded force of the decree of a court of his domicil. The Paris court will pay no attention to the Dakota divorce, and the Baron, if he is so minded, can make the future very unpleasant for his wife. The Baroness has not acted discreetly; she has evidently been advised: (1st) that her Dakota divorce is valid; (2nd) that it is especially valid in Dakota; (3d) that being valid generally, and especially valid in Dakota, her last marriage is valid in Dakota; and (4th) that her last marriage being valid in Dakota is, by international law, also valid everywhere. This reasoning is specious and logical in form, but still essentially bad; for the general rule that a marriage valid where celebrated is valid everywhere is qualified to the extent that, while the *forms* of entering into the contract are regulated by the *lex loci contractus*, the essentials of the contract depend upon the *lex domicilii*, so that, if contrary to the law of the domicil, it is void,[1] and the subsequent marriage of a female, already married, is void by the law of the Baroness' *domicil*, which I suppose is New York, Paris or Holland, even though she have antecedent divorce, which also, for want of jurisdiction over the person, would be invalid in either New York, Paris or Holland, or any other State or nation.[2]

[1] L. Cas., 193. 1 K. & J. 4. [2] 76 N.Y., 78. 101 N. Y., 23.

I make the following suggestions by way of recapitulation of a subject which might confuse the layman.

In all cases where a statute declares that a marriage between certain classes or under certain prescribed conditions shall be void without any judicial action, such marriage will be void everywhere by virtue of the plain rule that a marriage *valid* by the law of the place where celebrated is *valid* everywhere, and a marriage *void* by the law of the place where celebrated, will be *void* everywhere.

It does not, however, obtain in practice that a divorce which is valid where obtained will be valid everywhere, for a divorce may be valid where obtained, but void *everywhere* else, or void in some jurisdictions and valid in others, as has been seen herein. A decree which is void where rendered, will be void everywhere. A decree which on its face shows no jurisdiction, is *void* and a nullity, but one which on its face shows jurisdiction is not a nullity, but only voidable, and an interested party must institute proceedings within a reasonable time, after the discovery of it, to have it adjudged void, else it will or may mature into a valid decree, as to the direct parties, by efflux of time. Doubtless the decree may be abstractly bad, but the courts will not lend their aid to the negligent or inert.

Each party's negligence counts against him or her alone, and does not conclude any other who may have a right of attack. If a wife was barred by negligence, from annulling a voidable decree, by reason of fraud in obtaining it, the children of the marriage would not be barred from asserting their rights as heirs, to the exclusion of the alleged heirs of a subsequent marriage, despite the fact that the wife and mother had herself lost the right by negligence.

Suppose this case: that a wealthy man, having children, procures an unauthorized divorce against his wife, and she chooses, for any reason, not to attack it. Now the divorced husband marries a second time, and has a second family of children, and thereafter dies. The first wife may have lost

her right to annul the unauthorized divorce, but the children of the first marriage, may, nevertheless, come in as heirs and claim their heritage as heirs.

The courts which deny the extra-territorial force of a decree obtained upon publication alone, do so upon the ground that every man should be entitled to his day in court, before he can be bound. A judgment *in rem*, to bind property in the jurisdiction of the former, is good and equitable, for a property owner should take measures to protect his property in all jurisdictions where he may locate or leave it, but with a judgment *in personam* the man to be bound should have actual notice.

A movement is on foot to increase the required residence in South Dakota to one year, instead of three months. That, if effected, will produce no change in principle. A divorce obtained after one year's forced and simulated residence will be no more forcible or correct than a ninety days' residence. It is not the length of time that contains the vice, but the illegal and fraudulent intent and animus. Again, it sometimes occurs that both parties appear in the Dakota divorce suit, and get up a *sham* defence. There is this advantage in that mode of procedure, that neither party can arraign the decree elsewhere: but, abstractly considered, a case is no more clear of fraud when both parties participate in it than when only one does. If the parties are neither in good faith permanently domiciled in Dakota, but simply have a temporary residence there for divorce purposes, the decree is as voidable in one case as in the other, but there is this essential difference in practice: Both parties have participated in the fraud, hence neither can attack the decree, because neither has clean hands in the sense of equity practice; but any one interested outside of the parties, in property rights, and not connected with the fraud, can attack it. The proper mode for a defendant in a Dakota divorce suit should be to plead to the jurisdiction—*i. e.*, that plaintiff was not a *bona fide* citizen of Dakota—and make up an issue on that; or, if a decree is ren-

dered, should file a bill to impeach the Dakota decree for fraud. I have impleaded Utah decrees in Illinois courts as between the parties, and had them set aside in a collateral suit, as in an action for separate maintenance. But this was warranted because the Utah decree on its face showed no jurisdiction of either party, hence was a nullity. But the Dakota decrees cannot be collaterally impeached by the parties, because they show proper jurisdiction on their face.

A callow notion obtains in some quarters, that if both parties appear in Dakota, and have a mock or real contest, that insures a valid decree. Such is not the fact. Consent cannot confer jurisdiction, and a Dakota decree may be void for want of jurisdiction, even over the plaintiff, for lack of *domicil*, and may, in addition, be void for want of notice to, or appearance by, the defendant. In other words, it may be void for want of jurisdiction over either party, or it may be void for want of judicial notice to defendant, or it may be doubly void for want of both requisites.

Lay persons attach great consequences to a certified copy of a decree of divorce, or to an official certificate of a marriage, as the case may be. The needed solicitude does not inhere in either the existence or magnificence of either of these documents. A female may have a good marriage certificate, but if her alleged husband had another wife living from whom he was not validly divorced, the formal marriage certificate is *null*. The *real* wife, with or without a certificate, is the only wife, and the owner of the certificate is no wife at all. The certificate has no inherent force or strength. It is the fact behind it, that is all. So it is with a decree of divorce. A suitor who perpetrates a judicial fraud on a court finds himself very weak when a test comes. Several persons served terms in the penitentiary, although protected by decrees of divorce of other States.

A wife who learns that her faithless husband has cast her off by authority of a Dakota or Colorado divorce, feels that the whole world has deserted her. She is in error, if she

knows her rights: for she is now in position to take the offensive decidedly, which, if she does, her husband will wish he had never heard of Dakota, or Colorado, or easy divorces.

Suppose, however, a husband should attempt to disinherit his true wife and legitimate children by will, to the advantage of a fraudulent wife and spurious children? First, he could not deprive his true wife of dower, and, second, it would be easy to break a will which should disinherit his genuine children for those which were legally illegitimate. Undue influence would obtain a strong hold in such a case. In Illinois, in some contingencies, the true wife could get one-half his real estate and all his personalty, despite a will, and doubtless in other States similar advantage would accrue to her. But, as I have intimated, the only security hitherto to the person or property of the participants in fraudulent divorces, has been the lack of knowledge of the outraged and defrauded spouse, or her or his disinclination to demand justice. Unlike complex land titles, which demand litigation too stupendous to be dared by ordinary persons, this involves the utmost simplicity of scope and detail. And there are today, fortunes which would speedily change hands if subjected to the criticism of a court of equity; and all depending upon the clear proof that A. B. made a trip to, and had a summer residence in, Dakota, and while there got a divorce. That is all.

It may seem strange to the novice in such matters that laws should provide a method of service by publication, and that courts should disregard a decree obtained in a suit, where such requirements had been complied with. The probabilities are that no divorce should be granted except actual legal notice is had of such proceedings by the adverse party, but in case of desertion and flight, and frequently concealment and disappearance, no actual notice is possible: hence notice by publication must suffice, if a divorce is just and proper, for in those cases, no actual notice can be given. The court granting the divorce makes a decree on publication which is

satisfactory to its practice, and to the policy of the State in which the decree is granted. In theory, the divorce is of its own people, and is consequently no business to, or concern of, any other State. If the notice is given according to the law of the State where the decree is rendered, and no fraud exists, the decree is valid and binding by the law and practice of that State. So far all is well, but the difficulty and confusion is introduced when an attempt is made to give to that decree, force and effect in another State. Suppose a wife living in New York resorts to Dakota, and gets a decree against her husband, who remains in New York, upon a newspaper notice, and with it a decree for alimony, which she attempts to enforce in New York. The courts of New York justly say: "It is illogical and contrary to all analogy with other judicial proceedings to enforce a judgment in a suit when the alleged judgment debtor never had his day in court." Similar moral considerations apply to a case where a man, living and domiciled in Massachusetts, repairs to Colorado and, upon publication, secures a divorce against his wife, who has no actual notice of it. The Massachusetts courts say, justly, that she must have her actual day in court, and that nothing short of apt and legal notice will answer in lieu thereof. It even goes further and pronounces such a decree to be *void*. To illustrate by proceedings of attachment: A creditor may enforce a judgment against his non-resident debtor by a publication notice, so far as *property* lying in the vicinage of the notice is concerned, it being a judgment *in rem*, but such judgment has no extra-territorial force; if a judgment which will affect the person, be desired, then actual notice to the person, in legal and formal manner, must be given. The divorce decree on newspaper publication will be valid in the State where the decree is rendered, but may not be valid anywhere else. The current of decision is not conclusively and absolutely so, but is setting that way. Wherefore I suggest that a divorce obtained in a State where the plaintiff's domicil is not, and upon a newspaper publica-

tion, is doubly objectionable and hazardous, and, in point of fact, may be of no validity except in the State where rendered, if brought to a test.

When the consequences, social, industrial and economical, attendant upon the marital state are considered, it will be made apparent that it is illogical and a solecism in jurisprudence if such vast changes as are averred, can be wrought by a party procuring a fraudulent divorce in a foreign jurisdiction. In Illinois, for example, as I have shown, if there are no children of a union, at the death of the husband, the wife becomes the absolute owner of all the personal property and one-half the real estate of which the husband should die seized; nor could he deprive her of it by will. Is it presumable that a man thus circumstanced could resort to Dakota on a visit to Yellowstone Park, or to shoot quail, and while there get a divorce, and by that means disinherit his wife? Is it to be expected that the State of Illinois would permit its domestic policy to be set at naught by a Dakota judge? Or that a man, acting under the protection of such a decree, should desert his lawful wife and attempt to marry another, leaving the real wife to suffer? A State would be recreant to its highest duty of citizenship which would tolerate such an outrage. Courts are zealous to vindicate the rights of their own citizens against forays upon their rights by courts of these new States, which may seek to turn an honest penny by the traffic in, and sale of, unjust and impertinent decrees of divorce. The usual course is, in regard to persons who are without property, to let the adventuring spouse indulge in a divorce, inasmuch as it releases one as much as the other, and both form new connections, but, when considerable amount of property depends upon the validity or invalidity of of such divorces, they will be collapsed with the same ease and certainty that a soap bubble can be.

People of the highest order of character and respectability will violate positive marital laws, who would not violate a property law or any other social law, on any account. And

persons who are organically and constitutionally timid, will incur great risks about matrimonial matters, which they would not do, on any account, about any other matter. I have had instances where I have advised persons that if they pursued the line of policy desired by them, it would be technical bigamy by the husband, and technical adultery by the wife. Yet they would, with my advice echoing in their ears, deliberately pursue their policy, fully conscious of the consequences. It so happens, however, that it is only occasionally and very rarely that such crimes are punished, not known to their acquaintances at large, and not suggestive of any specific turpitude, even where known. In, perhaps, ninety-nine cases out of a hundred, the offenders against these marital laws are not disturbed, and in the one hundredth case, where prosecution does ensue, it is at the behest of the non-consenting and irate spouse, who is sinned against. Where both parties concur in the delinquency, it is not probable that any outside party will prosecute the matter.

Sometimes a person, whose domestic relations are not harmonious, will contract a second alliance, contingent upon the severance of the tie that binds, and will resort to Chicago, Colorado or Dakota, in order to get rid of the existing matrimonial burden. And a recent practice is, to celebrate the new marriage in Dakota, at the scene and forum of the divorce. Such was the policy of the Baroness de Stuers, who married her second affianced, on the day succeeding the granting of the decree, and such, I am advised, is a common custom of sagacious persons. The advantage of this course is, that they escape the consequences of the commission of bigamy: for a divorce granted by a Dakota court will, as a general rule, be sustained against any subsequent attack for fraud, want of jurisdiction, etc., and, consequently, the divorce being valid in Dakota, the subsequent marriage will also be valid there: hence the parties, even though they should return at once thereafter to the State of their domicil,

could not be indicted for bigamy there, because the marriage did not take place there: but they could be punished for the lesser offense of adultery, if, and provided, they cohabited together, there.

Whatever the moral delinquency may be, it certainly would seem prudent that persons who secure divorces in a State other than that of their domicil, and who marry subsequently, should guard against a criminal prosecution for bigamy, which can be done practically by the exercise of proper discretion as to the *locus in quo* of the second marriage: for the crime of bigamy is only cognizable by the law of the place where the same is celebrated, the law being thus set forth: "The common law considers crimes as altogether local, and cognizable and punishable exclusively in the country where they are committed. No other nation, therefore, has any right to punish them."[1] Lord Loughborough thus expressed it: "Penal laws of foreign countries are strictly local, and affect nothing more than they can reach, and can be seized by virtue of their authority."[2] Mr. Justice Buller stated the principle thus: "It is a general principle that the penal laws of one country cannot be taken notice of in another."[3] Finally Lord Brougham said: "The *lex loci* must needs govern all criminal jurisdiction, from the nature of the thing, and the purpose of the jurisdiction."[4] And Chief Justice Marshall said: "The courts of no State execute the penal laws of another."[5] In New York, bigamy is not punishable as an offense, when the second marriage took place out of that State, though the husband brought his wife to New York, and lived there.[6] If they cohabit together in New York, they are guilty of adultery, which is only a misdemeanor, and court say, to attempt to subject persons to trial and punishment within this State, for acts done without the territorial limits of the State, would be fruitless, and the legislative design to accomplish the purpose would be simply void.[7] Also held in same State that a person commit-

[1] Story's Conf. Laws, 516. [2] 1 H. Black., 135. [3] 3 T. R., 733. [4] 9 Bligh., 120. [5] 10 Wheat., 123. [6] 2 Park Cr. Cas., 195. [7] 4 Thomp., etc., 77.

ting a bigamous marriage in New York could not be indicted in any but the specific *county* where the same was celebrated. Same in Alabama;[1] same also in Missouri;[2] same, doubtless, everywhere.

If the second marriage in such case takes place beyond limits of North Carolina, cannot be punished for bigamy in North Carolina.[3] Now if persons are willing to take the risk of a spurious divorce, they should not be so reckless as to expose themselves to the danger of a prosecution for a felony, when it could be so easily guarded against. Suppose, therefore, a New York wife should visit Dakota and secure a divorce, with the design to return to New York, and remarry there. If she married in New York, she could be proceeded against for bigamy, but if she married in Dakota, she could not be. If the divorce was valid in Dakota, the marriage would be valid there also, and she would not be in danger of prosecution anywhere for bigamy, albeit the marriage would be invalid in New York; or, suppose she took a trip to Canada and got married; it would be bigamy in Canada, but she could not be extradited there, and, if she kept aloof from Canada, she would not be liable. So she might be married with practicable impunity in England or anywhere on the continent, or on shipboard: but it would not be needful to make a public ceremony of it; such a marriage should be done in the least ostentatious manner possible, and the locality should be selected, the least likely to produce trouble. But in Tennessee there was a statute providing that a married person who should either marry a second time, or *continue to cohabit* with such second husband or wife, should be punished, etc.—*held*, that the cohabitation was not bigamous, but was a statutory offense which could be punished: and it is quite possible that similar statutes exist in some other States, which should be seen to.

In Vermont the statute made it polygamy to cohabit with a second wife while the former one was living, although the

[1] 44 Ala., 24. [2] 75 Mo., 571. [3] 83 N. C., 615.

marriage took place elsewhere.[1] By virtue of the inharmony in the law and practice of divorce in the several States, the anomaly may be presented of a female being the lawful wife of one man in Dakota or Colorado, and the lawful wife of another man in New York, and that it might be adultery in one State to cohabit with her husband, and adultery in the other State to cohabit with the second husband, and a husband might have a plurality of wives, or a wife a plurality of husbands. That such an unwholesome and chaotic marital condition is possible, is a disgrace to our jurisprudence, as well as deleterious to the morals of the rising generation.

It has been held that, where A marries B, and, afterward, during B's life, marries C, and, at a still later time, when B is divorced, but, during C's life, marries D, the last marriage is not bigamous, because the second was void. 34 Ark., 511.

In Ohio, it was held that a marriage contracted by parties, either of whom is under the age of consent, and not confirmed by cohabitation after arriving at that age, will not subject a party to punishment for bigamy for contracting a subsequent marriage, while the first husband or wife is still living.[2]

In Michigan, it was held, that, although the second marriage was between a white and a negro, which is void by statute, yet, that it was bigamous.[3]

In Alabama, it was held that, if the first marriage is *void*, bigamy can not be averred of the second marriage: otherwise if it be voidable.[4]

It was held in New York, that a divorced person who is prevented by terms of the decree from marrying again, and does marry again in New York, is guilty of bigamy.[5] But, as has been seen elsewhere, he may marry in another State, in violation of the terms of the New York decree, and return to New York, and he will be unharmed.

[1] 18 Vt,. 570. [2] 20 Ohio 1. [3] 34 Mich., 339. [4] 55 Ala., 108. [5] 92 N. Y., 146.

XXXV.

PRACTICE AND PRECEDENTS.

The first step in a proceeding to obtain either a decree of divorce or nullity is to prepare and file in the proper court a bill, petition or libel, as it is indifferently termed in the practice, in different States. This document is an historical statement of the complainant's case, concluding with the demand for the relief desired. If the defendant is a resident of the State, a summons must be served upon him at least ten days, and, in some States, twenty days, before the term begins. If he is a non-resident, then a publication must be made in some newspaper of general circulation, published in the county, or, in the nearest county, if there be none there, according to a prescribed form, giving full notice of the pendency of the suit, and informing him that a decree will be rendered against him, unless he appears and makes a defence. In some States, a copy of this notice must be mailed to the defendant's last known place of residence, or to his then present residence, if known; and, when such requirement is not fulfilled, the decree obtained in such cases, is void.[1] If an answer is not made at the time required and designated, a default is entered, and the cause then stands for hearing on the regular default divorce docket. But no decree will be entered unless affirmative proof is made, satisfactory to the court, of the substance of the charges in the bill. In some States, as Indiana, Kentucky, Louisiana, Vermont and Washington, the county prosecuting attorney must appear for the defence in cases where it is otherwise unrepresented, and ex-

[1] 30 Ill. App., 159.

amine the witnesses, and see that the cause is sustained and the decree authorized. In such cases, the decree is entered, if justified, and, in Chicago, but not generally, the evidence is written out and preserved with the record.

Service is had, as a rule, as in other chancery suits, and when personal service can not be had, constructive notice may usually be given by publication; in some cases, publication is made as matter of course, and, in others, leave must be had. In *Connecticut*, if the defendant is not in the State, any judge or clerk of the Supreme court, or of the Superior court, or any county commissioner, may, in vacation, order such notice as he may deem reasonable; and the court may order further notice and continue the case till it has been given. In the Dakotas, the court may grant an order of publication.

In *Delaware*, if service is not to be had, an *alias* shall issue to next term, and publication be had. In the District of Columbia, if the affidavit of a disinterested witness be filed, that the defendant is a non-resident, or has been absent for six months, the court may order publication to be made. In *Florida*, if the defendant is absent from the State, or does not appear in the case, the court may order a hearing on the bill, and shall publish the order for three months, or, shall cause a copy of the bill and order to be served for at least three months before the actual hearing. In *Illinois*, publication may be had in cases of non-residents, and a copy of the notice must be mailed to the post office address of the defendant. In no case shall the court grant a divorce by default, unless the judge is satisfied that all proper means have been taken to notify the defendant of the pendency of the suit. * * * Whenever the judge is satisfied that the interests of the defendant require it, he may order such additional notice as equity may seem to require. In Indiana, on the affidavit of a disinterested person, publication may be had, and a marked copy of the paper mailed to the defendant's post office address. In *Kansas*, when publication is had, a

copy of the petition must be mailed to the defendant, if his address is known. In *Louisiana*, "when the defendant is absent, or incapable, for any cause, of acting, an attorney shall be appointed to represent him, against whom, contradictorily, the suit shall be prosecuted." In New Hampshire, such notice shall be given as the court may order. In Rhode Island, when publication is had, a citation and copy of the bill must be mailed to the place where the defendant was last heard from.

The methods of service do not differ much in the various States. Personal service is far more effectual to secure a decree that will hold, than service by publication. In Illinois, when a decree is obtained by constructive service (by publication), the defendant may come in at any time prior to the succeeding term of court, and file his answer, and have a hearing; and in any State, it will require but a slight showing to vacate and annul a decree obtained upon such notice. But in all States and Territories, publication may be resorted to in a case of absent defendants, and a decree obtained without their presence.

I here annex a notice from an English case; it is very similar to the notices by publication in our practice:

IN THE HIGH COURT OF JUSTICE.

PROBATE DIVORCE AND ADMIRALTY DIVISION.
(DIVORCE.)

To William Henry Jackson, late of New York, in the United States of America.—Take notice that a Citation bearing date the 2d day of November, 1892, has issued at the instance of Maria Cheadle Jackson, of Bloomfield House, Hanley, in the county of Stafford, citing you to appear within 30 days after service by publication hereof, and to answer the petition filed by the said Maria Cheadle Jackson, praying for a dissolution of marriage, and such citation contains as intimation that in default of your so doing the court will proceed to hear the said petition proved, in due course of law, and to pronounce sentence thereon, your absence notwithstanding, and a further intimation that, for the purpose aforesaid, you are to attend in person or by your solicitor at the divorce

registry at Somerset House, Strand, in the County of Middlesex, and there to enter an appearance in a book provided for that purpose, without which you will not be allowed to address the court in person or by counsel at any stage of the proceedings in the cause.

D. W. Owen, Registrar.

Burton & Stanley,
Solicitors, 116 Fenchurch st., London,
England.

If, however, a defence is made, or, if the wife is complainant, and the husband is within the jurisdiction of the court, the proceedings are, or may be, more extended and complicated.

The first step usually, is for the wife, whether complainant or defendant, to move for temporary alimony and a solicitor's fee, also suit money; that is, for means to support herself and children during the pendency of the litigation, for money to pay her solicitor, and to maintain the costs and expenses of the suit. This motion is usually supported by affidavits setting forth the style of life the parties lived in, and the husband's *faculties*—that is, his wealth and income. Counter affidavits are allowable both in denial, and also to show that the wife has a separate income of her own, sufficient, or is leading an adulterous life, and the courts grant or withhold the demand, in a summary way. Any such order, if an allowance is made, is appealable in Illinois, and perhaps elsewhere, but, in general, no appeal lies from an interlocutory order, as this is.

Sometimes the wife, whether plaintiff or defendant, obtains an injunction against the husband transferring his property until the suit is decided, or, until he gives security to pay any alimony she may ultimately obtain. The defendant then considers of, and determines upon, the defence, which varies, of course, according to circumstances.

The character of the defence may be arrayed under the following heads or titles:

1. Plea to the jurisdiction of the court, (a) that it has

no jurisdiction over the subject matter. (b) That it has no jurisdiction over the person, either of the plaintiff or defendant, or both.

2. Demurrer to bill, which admits all the facts charged, but denies that it gives any right of action.

3. Special pleas, as *laches* (or too long delay to sue), collusion, condonation, recrimination or connivance.

(4.) Answer, which is the usual mode of defense, and which may also embrace a demurrer and plea; in other words, a party may demur, plead and answer all in one document. The defendant having put in his defence, may next exhibit a cross-bill against the complainant, which constitutes the complainant a defendant as to the cross-bill, and demands a distinct defence to it, and similar proceedings as in an original suit. Both suits are usually tried together, and it may occur that a divorce may be denied to the complainant on the showing made by his original bill and allowed to the defendant on the cross-bill; or both bills may be dismissed, but it could scarcely occur (though logically possible) that both could obtain a divorce.

After the issues are settled, proofs are taken, generally by deposition, then the hearing is had. In some jurisdictions, oral evidence is authorized to be taken at the hearing, and in others not—it must be wholly by deposition: in some jurisdictions the parties can testify fully in their own behalf and they always may be examined by the opposite party, but need not give evidence tending to convict them of a crime, as assault and battery, or adultery, or bigamy: in other jurisdictions, they can only testify as to the fact of marriage, and in others, not at all. The *particeps criminis* in adultery, even though a prostitute, or a detective, may be heard, but not much weight usually is given to their testimony. In some jurisdictions, jury trials are ordered to decide matters of fact; in others, a jury may be had at discretion of court, and, in still others, the judge or chancellor hears the case, and in one State, there must be the verdicts of two successive juries.

The first proof in order, is of the marriage; if that fails, the bill is dismissed without going further. In point of fact, the lawyer-like mode of raising that specific issue would be by a special plea containing nothing more, for, if the marriage failed, the foundation of the entire structure was wanting. If a decree of divorce is allowed, and the wife is complainant, or if the decree is in her favor if she, being defendant, files a cross-bill, the question of alimony and the custody of the children is to be determined, and, if any serious question arises on that branch of the case, a reference is had to a master to take proofs of the husband's, and likewise of the wife's, faculties; *i. e.*, the wealth, income and style of living. The decree is then written out by the prevailing solicitor, and entered of record. An appeal will lie, in which case the husband must provide temporary alimony, suit money and solicitor's fee for the prosecution of the appeal, and, if the decree is affirmed, then it must be enforced: but as to alimony and custody of children, it may be modified at any time or term afterward. In some jurisdictions, the wife may pray for leave to resume her maiden, or any previous, name, and, if she gets a decree, her prayer will be allowed. There is no settled or stable rule as to the disposition of the children. The father is, in strict law, the guardian of all his children, but unless the mother is adulterous or otherwise unsuitable, she generally is awarded the custody of the extremely young children, and especially of those, nursing. In such, or any other case, the other parent is usually allowed to visit the child not in his or her custody, at stated times. My recollection is that Mrs. Leslie Carter is allowed to have the custody of her child one week in the year, a privilege which she avails herself of, and prizes very highly. In some States, and noticeably in England, the *particeps criminis* is joined as a co-respondent, and served with process, and frequently is amerced in the costs, or part of them. A service, either of the main defendant or the co-respondent, if the same be made within the jurisdiction of the court, is good if made in the penitentiary,

or in an insane hospital. An infant wife may sue, if she has attained the age of legal consent, for nullity of the marriage. Several causes for action may be joined in the same bill or libel, without being open to the charge of multifariousness. The jurisdictional clause should never be omitted from the bill or libel, as that the complainant has resided in the State for more than one year, or more, as the case may be, or that the cause of action arose within that jurisdiction. Some pleaders include a clause negativing collusion and condonation, but it is needless, and, indeed, is not good practice. The allegations and proofs must correspond; and the proof of all facts alleged, either in attack or defence, devolves upon the party who affirmatively urges them. A pleader secures a very bad name who states indelicate facts in a manner to indicate that they appear savory to him; language just as graphic and emphatic, which does not jar upon the senses, can be employed to narrate the nastiest details, and should be so done. A practitioner must sometimes deal in obscene matters, but if he be a gentleman and a man of sense, he can develop his ideas fully, without raising a blush on the cheek of modesty, and he will prosper with his suit all the more for doing so. This remark applies all along the line, commencing with the office consultation and ending with the draughting of the decree.

One of the most sacred and solemn duties of an honorable profession is to treat with ideal and refined delicacy the divorce client in the office, and, more especially, if the client be a female. It is one of the most delicate trials of a pure woman's life to approach a lawyer, and confide her marital secrets to him. There is a way to inspire confidence and courage in the most timid woman, if rightly managed. The way to do is to put a very few terse questions, modestly, but with a matter-of-fact, confident air, as if it was commonplace; and waive aside any long narrative; any ordinary divorce case has but a few strong points, which the practitioner can gather up, in a few moments, and can state, his

conclusion in a few words. He has no more business to pry into details than any outsider has; because he has a good chance to revel in the murky realms of the libidinous or obscene with an unfortunate person for an auditor, is no reason for so doing; if he has a pruriency that cannot be appeased, he should at least dismiss his auditor, and take some other mode of appeasing a detestable craving. Similar action will apply to the pleadings and court examinations; all should be delicately and considerately done. A court rebels at once at a practice of either awkward or premeditated indulgence in superfluous nastiness. I have tried many divorce cases, and had many more consultations, but never used an heterodox word, and never found any necessity for a single scrap of oral or orthographical indecency. A court does not need that such ideas as are incident to divorce cases be paraphrased; "a wink is as good as a nod" in an unsavory divorce suit.

A client should be frank and disengenuous with his or her lawyer, and not hesitate to put him in possession of all needed facts, and not suppress any from motives of delicacy, or otherwise. It is professional with the practitioner, and has no further effect upon his sensibilities than the trite facts of a suit on a land contract.

Lord Mansfield said that: "Indecency of evidence is no objection to its being received when it is necessary to the decision of a civil or criminal right."[1] And Lord Stowell said; "Courts of law are not invested with the power of selection; they must take the law as it is imposed on them. Courts of the highest jurisdiction must often go into cases of the most odious nature when the proceeding is for the punishment of the offender; here the claim is for a remedy, and the court cannot refuse to entertain it on any fastidious notions of its own."[2] But an American judge said very properly: "Courts may, and always should, require the examination of witness-

[1] Cowp., 729. [2] 3 Phillim., 325.

es to be conducted in a spirit of due delicacy, avoiding vulgar and obscene language."[1]

If the residence and domicil is *bona fide*, a party is not bound to remain there after he has filed his bill or libel; all that is required is that he shall have a *bona fide* domicil at the time of bringing suit. After suit is brought, he may remove elsewhere, as well after suit brought, as after decree.

It is not lawyer-like pleading to negative a defence in advance in a bill, as condonation, connivance, or the like; the defendant may not charge any special defence of that kind, and, if he or she does, the formal replication sufficiently and effectually denies it. Where adultery is charged, make it as specific as practicable, both as to time, place and person, and then add a clause charging it likewise with some person, time and place, to the complainant unknown. In an answer, the better practice is to state all the denials, and affirmatively answer all the allegations of the bill or libel, and then state the positive averments of defence, as condonation, recrimination, etc. If the defendant intends to also seek a divorce in a cross-bill, it is desirable to file his answer and cross-bill simultaneously, so as to prevent the complainant from dismissing his bill or libel, which he has a right to do at any time antecedent to the filing of the cross-bill, but no right to do so thereafter. Wherever the law allows the waiver of the oath, but allows the examination of the adverse party as a witness, it is well to waive the oath, as if the oath be not waived it has the force of two witnesses to be overcome; while, if you need his or her evidence, he or she can be put upon the stand, and the evidence have only the force of one witness. In desertion cases, it is necessary to show that there was no valid cause for it.

In the old English practice, in adultery cases, it was allowable to ask the witness who might testify as to apparent facts and circumstances tending to show adultery, what his opinion was on the subject; such is not the practice here.

[1] 8 Fla., 243.

The witness must merely state what he saw, and the court will draw the inference.

In most of States, as we have seen, the only restrictions upon marriage are, that the guilty party cannot marry, but this is a *brutem fulmen*, if the parties choose to seek another jurisdiction: but, in some States, it is provided by statute, that, if such a party marries, even in another State, in violation of such order, it shall have the same force as if celebrated in that State; i. e., it would be either a contempt of court, or a nullity, or bigamy, as the case might be. In Louisiana, it is forbidden to marry the accomplice in adultery, and it is made bigamy to do so. In several States, as I have shown, in case of undefended divorce, or nullity suits, the prosecuting attorney must attend and defend. In Montana, this excellent statute is of force, and it should be universally adopted, as any person of good instinct would affirm, could he see the lecherous crowd which flocks to the Chicago divorce courts on the trial of default cases, hoping to hear scandalous details in cases they have no interest in, at all. "In an action for divorce, the court may direct the trial of any issue of fact joined therein, to be private, and, upon such direction, all persons may be excluded, except the officers of the court, the parties, their witnesses, and counsel."

The practice is substantially the same in all the States and Territories. Commencement of the suit is by bill or petition, setting up the necessary facts, and praying for the desired relief. Whether the bill or petition must be sworn to, depends upon the local statute.

The issuance of summons citing the defendant in court is the next step. If the defendant is a non-resident, or can not be found, upon affidavit of such fact being made, a publication is ordered in the nearest newspaper, usually for three or four weeks; in some States, it is required to mail a newspaper, or other notice, to the mail address of the defendant, where known.

At the proper time the hearing ensues: delays are not usual in this class of cases. In some States, a reference may be had to, and a report made by, a master of the court; in others, the court itself will hear the case in open court; in fact, it is believed, the latter regulation is becoming quite general in the new States on account of the abuses inherent in the other practice: sometimes, property matters are involved, and injunctions are obtained. Alimony, or a support from a husband to a wife, is one of the ordinary incidents of a contested suit; sometimes, by special statute, the aid of a jury is sought to investigate controverted facts. In some States, in *ex-parte* suits, the evidence is required to be written out and preserved in the record; no decree is obtainable except on proof; a mere default does not entitle a party to relief. In cities where they have open divorce courts, a beastly assemblage of licentious loafers usually attend the entire sessions of court, eager to snap up all the crumbs and morsels of scandal and prurient revelations possible, but it is held that disgusting details must not be withheld, when necessary for the enlightenment of the court, in divorce cases.

These cases are tried in civil courts, like other chancery cases.

Appeals in some jurisdictions are freely allowed, and in others not; in some jurisdictions, also, appeals may be had on certain conditions, or in certain states of case; each specific locality must be scrutinized in order to determine the extent of appeal. The fact of marriage may be shown by the record thereof, if there be a record, or, in many of the States, by statute, by general reputation, proof of cohabitation, or admission of the defendant; there is usually no difficulty in this stage of the case. In nearly all of our States, parties themselves are competent witnesses. Depositions may be taken ordinarily in divorce, as in other cases.

A cross-bill may be filed by defendant, in which a divorce may be sought against the complainant, or, in States where a separate maintenance is allowed, it may be brought

by cross-bill for that relief; several causes for divorce may be alleged in the same bill or cross-bill, and it will not be multifarious on that account.

There are, in some States, two kinds of divorce: one is *a vinculo matrimonii*, and the other, or limited kind, a *mensa et thoro*; the first is an absolute divorce, the second may be only for a limited time, in the further discretion of the court. In some States, a divorce debars the defendant from marrying again, but, in the newer States, there is usually no bar at all. In some States, the wife may resume her maiden name, or that of any former husband, by decree.

Custody of children is confided to the discretion of the court; if the mother is an adulteress, especially if she embraces the life of a prostitute, all the children will ordinarily be taken from her; if the husband be shown to be unsuitable to have charge of the children, and the mother to be suitable, they may all be withdrawn from his charge.

The pleadings and decree in a divorce suit become a matter of record, and transcripts thereof may be had by any one who chooses to pay the clerk for making them, but it is not in any wise necessary for any person to be possessed of the decree, nor will it make their divorce any the more effective. It is the facts only, and legally entered of record, which constitute the effective work, not certainly a finely engrossed copy of the decree; there are probably a ton or more transcripts of Utah divorce decrees in the hands of our various fellow-citizens, and which cost perhaps millions of dollars to obtain: if they were all collected together, their aggregate value would be just the value of waste paper, and no more. It is believed that no jurisdiction exists now where "incompatibility of temper" is an avowed cause for divorce; it was an implied cause in Indiana a few years ago, and brought the State into such scandal and disrepute, that no State has ventured to re-enact it. If a decree of divorce or nullity had been procured by fraud, it may be vacated at any time by a direct proceeding for that

purpose, but a collateral proceeding will not, ordinarily, avail therefor. If the court pronouncing the decree, had no jurisdiction over the subject matter, or over the parties, as in the Utah cases, then the divorce is absolutely void, and may be questioned even collaterally by any interested person; a valid decree in one State may be pleaded in bar of a suit for divorce in another State, but its validity may be tested on an issue formed for that purpose.

A divorce will not be granted upon the uncorroborated testimony of husband and wife; a court has power to vacate a decree of divorce for fraud or imposition, and will do so when the fraud or imposition is clearly shown.

THE ESPECIAL PRACTICE IN CHICAGO.

There are two several courts in Chicago which have jurisdiction of divorce suits, viz.: the Circuit court, and the Superior court. Each of those courts have three judges assigned to transact chancery business, and divorce suits, of course, belong to the chancery calendar.

The mode of procedure is to file a bill, setting forth the grievances complained of, and a demand for the relief desired, whether for divorce simply, or for alimony and custody of children also. The fees payable upon the filing of this bill are $6.00, to the clerk, and one dollar to the sheriff, provided service is to be had upon the defendant; otherwise ten cents if the defendant is not to be served, simply for the return of the writ. If defendant be a non-resident, then a publication must be had in some newspaper of general circulation within the county, for four successive weeks, the interval of time between the first publication and the first day of the term of court to be forty days. The cost of publication is usually three dollars. The Chicago Legal News is the paper usually sought. Then, copy of the notice must be mailed to the defendant, if his or her residence be known. There are no co-respondents to be served with process in this State.

After service is had, or publication has been made for a sufficient statutory time, the case is subject to the following rule of court, being rule No. 8 of each court:

8.—DIVORCES AND DEFAULT CASES.

All divorces and other default cases, in which notice shall be given the clerk to place the same upon the default calendar, will be heard upon Saturday of each week. No references shall be allowed in divorce cases except as to question of alimony, and all testimony must be taken by depositions or in open court, When taken in open court, it must be taken in shorthand, written out and presented to the court, and filed, before a decree will be entered. No decree of divorce will be granted upon the unsupported testimony of the complainant.

When an answer is filed the case may be placed on the trial calendar, upon notice and motion thereof, and heard in its order.

The cost of the stenographer is $5.00 for attendance in an ordinary case, and twenty cents per folio for writing out the evidence, the whole not exceeding ten dollars in all.

The Circuit court sits on the third Monday of each month, and the Superior court on the first Monday of each month. Vacation of both courts commences on the third Monday in July, and terminates on the Saturday preceding the third Monday in September of each year. No business in divorce suits is usually done in vacation.

The judges are lawyers of great probity and legal learning, and scrutinize each case with care; but, notwithstanding, many fraudulent divorces are obtained. There is such a large floating population in Chicago—traveling men, actors, casual visitors, etc., who really are hardly citizens of Illinois, yet who may, with a very little strain of conscience, claim a residence there, that many divorces are obtained, some of which are entirely unauthorized; and others of which, though somewhat "off color," might, nevertheless, pass through a judicial contest.

I annex in this place, and as somewhat illustrative of

this subject, and as conclusive of the rule of our Supreme court on the subject of fraudulent divorces in general, the recent case of Caswell vs. Caswell, 120 Ill., 377:

"This was a bill in the nature of a bill of review brought on December 22, 1883, to impeach and annul a decree of divorce * * entered at the September term, 1869, of said court, on the ground of its having been fraudulently obtained. Court said: 'There is no doubt * * that the decree of divorce was fraudulently obtained. It is insisted, however, that, if that be so, all of fraud that there was, was in obtaining the decree by false evidence, and that for such a fraud, a judgment or decree cannot be impeached in a separate and independent proceeding, and admitting the rule to be otherwise where the fraud complained of is a fraud whereby the court was given a colorable jurisdiction of the defendant's person, when there was not real jurisdiction of it, and it is denied that there was any fraud of the latter kind in the case.' There is a distinction 'between these two classes of cases—of fraud in giving jurisdiction, and fraud committed after the jurisdiction had, in fact, attached.' *

"We are of opinion that there was fraud here in both the respects named—fraud in the giving of false evidence, and fraud with respect to giving jurisdiction. At the time of the institution of the divorce proceedings, and obtaining the decree of divorce, the defendant was not a non-resident of the State of Illinois, but was a resident of the State. She was absent from the State temporarily, only when her husband had sent her, willing and desirous to return to him in this State, and being prevented from so doing by himself. In such case, the husband cannot treat his wife as a non-resident, but her residence and domicil are the same as his. * Yet the complainant, by his false affidavit, that the defendant was a non-resident of the State, * * induced the court to take cognizance of the case, upon notice to the defendant only by publication, when, under the fact as existing, there could have been jurisdiction of the person of the defendant only upon personal service of summons upon her, or of a copy of the bill, together with a notice of the commencement of the suit. * * We find * * that there was no jurisdiction of the person of the defendant in the divorce suit; that by the perpetration of a fraud by the complainant herein, there was given apparent jurisdiction over

the defendant; that the notice by publication was not due and legal notice, and should be taken as no notice. So that the decree was rendered against the defendant without notice of the suit, or opportunity to defend against it.

"We think the appellee is entitled to the relief she asks, unless she is barred of her suit by the delay in bringing it. * * Under the circumstances, we do not think there was any unreasonable delay in bringing the suit. * * The fact of appellant's re-marriage, of there being children thereof, * * and of the hardship which will result to innocent persons from setting aside the decree of divorce, are dwelt upon as objections to the granting of such relief. Such ill consequences we can appreciate, and must regret; but yet, they do not form reason sufficient for a denial of the exercise of the court's power to vacate such a decree, obtained by fraud, as has been often determined."[1]

By this decision, it will appear that the Supreme court of Illinois is disposed to sit down hard upon fraudulent divorces, although, it must be confessed, that this was a glaring and extreme case.

I will add the following rule of court as applicable to divorce cases, where there is a contest:

RULE 13.

Ordered, That, in all cases, heard in this court, the parties shall prepare an abstract or abridgment of their respective pleadings, and of the evidence, when the same shall have been taken by deposition or before a master in chancery, and such abstract of the pleadings and evidence shall be read on the hearing in lieu of the original pleadings and depositions.

A female plaintiff who obtains a decree of divorce may be restored to her maiden name or to that of any former husband, in the following States, viz.: Massachusetts, Vermont, Rhode Island, Connecticut, Ohio, Illinois, Minnesota, Kansas, Kentucky, Georgia, Texas, Washington, Oregon, Missouri, Nevada, Arkansas, District of Columbia, Arizona; and in Vermont the names of the minor children may be changed; likewise in District of Columbia, Texas, Washington, Arizona,

[1] 30 Wis., 452. 46 Iowa, 648. 46 Iowa, 437. 6 Minn, 458. 23 Kan., 513. 51 N. H., 388.

and Oregon the wife's name may be changed in any divorce suit to which she is a party.

DERIVATIVE OR UNWRITTEN LAW.

When a statute makes no provision concerning connivance, condonation, or recrimination, it will be assumed that the legislature and courts "intended to adopt the general principles which had governed the Ecclesiastical courts of England, in granting divorces from bed and board, so far as they were applicable and reasonable."[1]

And in the administration of divorce law in this country, all of our courts rely on the decisions of the Ecclesiastical courts, to the same extent and import that they do of common law cases.

The reasons, chiefly, why the English divorce law is not imported into our jurisprudence, are: (1st) That there were no judicial divorces in England anterior to the treaty of peace between our country and England; (2d) That there never were any Ecclesiastical courts in this country. Hence, our law-makers were compelled to hew out original paths both as to the body of divorce law, and also as to its practice; and in doing so, each State had emphatic ideas of its own, as in South Carolina, where they would have *no* divorce; or in New York, where they had but two causes; or Indiana, or Utah, where mere dissatisfaction of the marital yoke was sufficient cause for divorce. The decisions of the English divorce court and those of the several States are authority as in other cases so far as applicable, and when not overruled by statute.

FORM OF BILL FOR DIVORCE.

STATE OF ILLINOIS, } ss. CIRCUIT COURT,
CHAMPAIGN COUNTY. } OF THE OCTOBER TERM THEREOF,
A. D., 1855.

In the Circuit court, within and for the county of Champaign, and State of Illinois: *To the Honorable David Davis,*

[1] Robbins. 140 Mass., 528. 1 Johns' Chy., 488. 2 Paige, 108. 14 Wend., 637.

Judge of said court, in chancery sitting: Humbly complaining, showeth unto your Honor, your oratrix, Persis St. John, of said county, that her maiden name was Persis Sampson, and that, on the 19th day of May, A. D., 1838, at Norwalk, in the State of Ohio, by the Rev. William T. McConn, pastor of the Baptist church at said Norwalk, and at and within said church, your oratrix was duly and legally joined in marriage with one Alpheus T. St. John, who, from thenceforth, became, continued to be, and still remains, the lawful husband of your oratrix; and, that, from thenceforth, your oratrix hath ever been, remained, and still doth continue to be, a faithful, loving and obedient wife to said Alpheus, and constant to her marriage vows; that there have been born, to your oratrix, as the issue of said marriage, and who still survive, two several children, to-wit: Margaret, now aged sixteen years, the wife of one David Grow, but living with your oratrix, as part of her family (her husband having deserted her), and Thomas, now aged twelve years, and also living with your oratrix, and constituting part of her family.

And your oratrix further showeth that on, to-wit, the first day of May, A. D., 1852, the said Alpheus, without just cause, wholly deserted and abandoned your oratrix, and that the said desertion and abandonment hath continued unremittently since, and still doth continue; and, that, the same is of more than two years' duration, prior to the filing of this bill of complaint.

And your oratrix avers that she hath resided in the State of Illinois for more than one whole consecutive year prior to the filing of her bill of complaint, and that her present residence is in Champaign county, in said State.

Therefore: in view of the premises, and inasmuch as your oratrix is remediless save in a court of equity, where matters of this sort are cognizable and remediable, she solicits the aid of this court in the premises, and would, therefore pray, that the said Alpheus T. St. John be made a party defendant to this bill, with apt and proper words to charge

him; and that he may be compelled, on or before the first day of the next term of this court, to be and to appear before this honorable court, then and there to answer all and singular, the matters and things herein set forth and averred, but without oath (the oath of said defendant being herein expressly waived), and that, at the final hearing hereof, the bonds of matrimony heretofore and now existing between your oratrix and the said Alpheus may be dissolved, and your oratrix divorced from him; and that your oratrix may be entrusted with the custody of her said children; and that she may have alimony awarded to her, to be paid by the said Alpheus; and that she may be restored to her maiden name, and be known and called by the same, henceforth; and for such other, further and different relief as may be in accordance with equity and good conscience. May it please your Honor to grant and issue a writ of subpœna, directed to the sheriff of the county aforesaid, commanding him to subpœna the said Alpheus T. St. John, according to law, to answer as aforesaid, without oath. PERSIS ST. JOHN.

HENRY C. WHITNEY, *Complainant's Solicitor.*

(AFFIDAVIT.)

MOTIONS.—(INTERLOCUTORY.)

ST. JOHN *vs.* ST. JOHN. } *In Chancery. Bill for Divorce*

The complainant now here moves the court:

(1.) For a suitable and necessary sum for solicitor's fees.

(2.) For a suitable and necessary sum for suit money.

(3.) For the sum of fifty dollars per month as alimony *pendente lite* for the support and maintenance of herself and her two children. All to be allowed and awarded out of, and from the estate of, said complainant, under penalty, etc.

WHITNEY, *Solicitor.*

ST. JOHN
vs.
ST. JOHN. } *In Chancery. Bill for Divorce.*

The complainant now here comes and moves:

That a provisional injunction be issued out of, and under, the seal of this court, restraining and enjoining the defendant herein from aliening, incumbering, or transferring all or any portion of his real estate lying within the limits of this county, until the termination of this suit, or until further order of court herein, and for a writ of injunction to carry the same into effect. WHITNEY, *Solicitor.*

DECREE.

ST. JOHN
vs.
ST. JOHN. } *Divorce.*

And now at this day comes the complainant in her own proper person and by Whitney, her solicitor, and the respondent having been three times solemnly called, comes not, but makes default, and it is therefore ordered that a decree *pro confesso* be taken against him, the said respondent. And it appearing to the court that an affidavit was filed in this case setting forth that the said respondent was a non-resident of the State of Illinois, and that in fact the said respondent was a resident of San Raphael, in the State of California, and that a notice of the pendency of this suit, according to law, was published in the *Urbana Union*, a weekly newspaper of general circulation, published in the county of Champaign, Illinois, for four successive weeks, the first of said publications being made over forty days prior to the first day of the sitting of the court at this term, and that a notice in accordance with the statute of Illinois was mailed to said respondent, at his said postoffice address, of San Raphael, in the State of California. And it further appearing to the court that the said complainant and the said respondent were duly intermarried together at Norwalk, Ohio, on the 19th day of May, 1838, and they have constantly since been,

and now are, husband and wife; that the maiden name of complainant was Persis Sampson; that there were, as the issue of said marriage, who still survive, two children, to-wit: Margaret, the wife of David Grow (but who has deserted her) aged sixteen years, and Thomas, aged twelve years, both residing with complainant, and that complainant hath always been faithful to her marriage vows; and it also appearing that the said respondent did, for more than two years prior to the filing of the bill herein, desert and absent himself from complainant, without just cause, which desertion still continues; and it appearing that complainant hath resided in the State of Illinois for more than one whole year prior to the filing of the bill herein, and now, and at the filing of said bill, did and doth reside in Champaign county, Illinois, and the court being fully advised in the premises, doth *order, adjudge* and *decree:*

(1.) That the bonds of matrimony heretofore and now existing by and between the complainant and defendant be totally and forever dissolved, and that the said complainant and defendant be divorced.

(2.) That the complainant be restored to her maiden name of Persis Sampson, and be called and known by such maiden name henceforth.

(3.) That complainant have the custody, nurture and control of her two said children, free from any interference of defendant herein.

(4.) That the sum of one hundred dollars solicitor's fee; the sum of twenty dollars for suit money: and permanent alimony of thirty dollars per month, to date from the filing of the bill herein, be awarded to complainant, to be collected from the estate or property of defendant, lying within this State, and that execution go therefor: and that respondent pay each and all of said sums under the pains and penalties of being in contempt of this court.

(5.) That complainant pay the costs of this suit.

(Entered and enrolled this 29th day of October, 1855.)

COPY OF BILL FOR DIVORCE.

In the Superior Court of Cook County, and State of Illinois, of the March Term Thereof, A. D. 1878.

To the Honorable Judges of said Court, in Chancery sitting.

Mary F. Flicker, the complainant, brings this her bill against Jonas P. Flicker, the defendant, and thereupon the complainant alleges: (1) That the complainant's maiden name was Mary Forgyne, and that on the seventeenth day of June, A. D. 1872, or thereabouts, at Ithaca, in the State of New York, the said complainant and defendant entered into a mutual contract *per verba de presenti* of intermarriage together, both then and there having the physical and contractual capacity of marriage, and at once thereupon confirmed and consummated said marriage by cohabitation together, and they continued such marriage and cohabitation until the sixth day of January last, at which latter date, for the causes hereafter to be enumerated, complainant refused further cohabitation, and hath not done so since said latter date.

(2.) That constantly since the original date of said marriage, complainant hath performed her marital vows in a faithful, lawful and obedient manner, and she hath endeavored in all ways to retain the love and affection of her said husband.

(3.) That, regardless of his marriage vows, the defendant did, in a certain bed-chamber in a house situated and being at No. 121 Geronimo street, in the city of Milwaukee, Wisconsin, on the 12th day of May, A. D. 1877, and at divers times thereafter, both at the place aforesaid and at divers other places, have carnal knowledge of one Kate Wygand, an unmarried female, and did then and there, and at each and all of said times and places, commit adultery with the said Kate, without the knowledge, consent or acquiescence of complainant.

(4.) That, regardless of his marriage vows, the defendant also did at divers times and places within the State

and jurisdiction of Illinois, to this complainant unknown, commencing on the first day of January, A. D. 1877, have carnal and illicit knowledge of, and illicit intercourse with, divers other females whose names are to this complainant unknown, but whose names when ascertained, complainant prays may be inserted in this place, with the same force and effect as if originally inserted here now.

(5.) And complainant avers that she had no notice or knowledge of any act of adultery on the part of her husband until the sixth day of January last, when he confessed the perpetration thereof to complainant, and that immediately upon receiving such knowledge, complainant instantly withdrew from defendant's bed, and since then has had no voluntary sexual intercourse with him.

(6.) But complainant avers that she had no other home or friends to whom she could go, and that she was obliged to remain at the home of defendant, and while so remaining there, complainant was on several occasions forcibly assaulted by the defendant and sexually embraced by him, against her utmost resistance, remonstrances and protests, nor did complainant ever at any time after said acts, or any or either of them, justify, approve of or forgive the same, nor did she in any way co-operate in, or yield to, said embraces except so far as thereto compelled by the superior moral and physical strength of defendant.

(7.) And complainant avers that three children were born of said marriage, all now living and in the custody of complainant, to-wit: Jonas, now aged five years; Mary Ann, now aged three years, and Wilfer, now aged two years.

(8.) Complainant further avers that she hath resided in the State of Illinois for more than one year prior to the bringing of this suit, and that she is now a resident of the county of Cook, therein.

Complainant prays:

(1). That the said Jonas P. Flicker may be made a defendant hereto.

(2.) That he may be compelled to answer this bill and all the several allegations of the same, by next rule day, but without oath, his oath to said, or any answer, being expressly waived.

(3.) That a formal marriage may be declared to exist between complainant and defendant, and that the same may be dissolved and annulled.

(4.) That the custody of said children may be awarded to complainant.

(5.) That complainant may be allowed to resume her maiden name.

(6). That alimony *pendente lite*, suit money and a solicitor's fee, and permanent alimony, may be awarded to complainant.

7.) That an injunction may be issued restraining defendant from attempting to sexually know complainant, or soliciting same.

(8.) And for such other and further relief as may be legal and proper.

(9.) Also for subpœna in chancery in accordance with law.

WELDON RACKSTRAW, *Solicitor.* MARY P. FLICKER.

STATE OF ILLINOIS, } ss.
COUNTY OF COOK, }

Mary P. Flicker maketh oath and saith that she is complainant in the above and foregoing bill, and that the same is true, except so much and such parts thereof as are averred upon information and belief, and so much and such parts thereof, affiant believes to be true.

MARY P. FLICKER.

Subscribed and sworn to before me this 27th day of February, A. D. 1878. WELDON RACKSTRAW, *N. P.*

COPY OF ANSWER IN DIVORCE SUIT.

JONAS P. FLICKER, }
ats. } *In Divorce.*
MARY F. FLICKER. }

The answer of the respondent, Jonas P. Flicker, to the bill of complaint of Mary F. Flicker, complainant.

This respondent, saving and reserving, etc., for answer to so much and such parts of complainant's bill as he is advised is or are necessary to make answer unto, answering saith:

(1.) Is not fully or definitely advised if complainant's maiden name was Mary Forgyne, but is willing to concede that it was so, and therefore admits that such was the fact, in manner and form as charged.

(2.) *Denies* that on June 17, 1872, or thereabouts, at Ithaca, New York, or at any other time or place, complainant and respondent entered into a mutual contract, *per verba de presenti*, of intermarriage together; denies also that complainant and respondent "at once" confirmed and consummated the said or any alleged marriage by cohabitation, together or otherwise; denies that the said alleged or any marriage and innocent cohabitation continued till January sixth last, or otherwise at all; but on the contrary thereof, respondent admits and alleges that on the first day of May, 1872, or thereabouts, respondent had carnal and illicit sexual knowledge of, and sexual contact with, complainant; and that the same continued at intervals and periodically, until about ten days before the filing of complainant's bill, when respondent withdrew from all connection of any sort with, or about, said complainant; and respondent expressly denies that any or all said acts of cohabitation was or were lawful or legitimate, or in pursuance of any agreement of intermarriage, express or implied; but that said sexual intercourse, and every act thereof, was licentious, meretricious and illicit, and so understood and accepted by both parties; that complainant frequently importuned respondent to marry her, and that respondent frequently promised that he would consider of the matter, but that he never at any time did in fact promise to do so.

(3.) Denies that she performed her marital vows at all; denies that she ever made any marital vows, to respondent's knowledge, or to him, or in his presence; denies that com-

plainant tried to retain defendant's love and affection, and denies that he ever was her husband.

(4.) Denies that he ever, at the place named in complainant's bill, or at any other place, or at the time or times stated, or at any other time or times, had carnal knowledge of one Kate Wygand, or of any other female except complainant, at any time or place: but upon advice of counsel and upon belief, respondent avers that complainant has no right to challenge, inquire into, or complain of, any such acts, and that he does not hold himself responsible to complainant for his conduct or actions in any way whatever.

(5.) Admits that respondent sexually embraced complainant at many times prior to ten days before the filing of complainant's bill, but never by force, artifice or fraud; that complainant and respondent mutually cohabited, always with the free and voluntary assent of both parties, and that respondent never attempted to sexually know her against her consent, remonstrance or protest.

(6.) Admits that the children were born as stated; admits that they are severally in the custody of complainant; and that their given names are as stated, but denies that they have been born of any marriage known to respondent; and for want of accurate knowledge of the paternity of said children, cannot state who their father or fathers was, or were.

(7.) And respondent admits that complainant has resided in the State of Illinois for more than a year before the filing of her bill, and that at the time of filing her bill, she resided in Cook county.

(8.) And respondent, further answering, avers that even if he had carnal knowledge of the said Kate Wygand, that the same was had by the connivance of complainant, who frequently, before the alleged sexual commerce with said Kate, suggested that respondent easily could and ought to have such commerce; and also frequently created appointments for respondent to have such commerce: that complainant frequently invited said Kate to her house, and while said

Kate was there, complainant absented herself from the house on various pretenses, remaining away long enough to admit of an opportunity to perform the sexual act with said Kate, and leaving respondent and Kate in the room together, alone. Respondent denies that he ever at any time had any connection of a sexual nature with said Kate, but avers that complainant connived at his doing so, and did all she could to incite defendant thereto.

(9.) And respondent further answering, avers that even if he had had carnal knowledge of said Kate Wygand the complainant first connived thereat, and thereafter condoned the same, by having sexual intercourse with defendant, and solicited the same from him as lately as ten days antecedent to the filing of her bill in this case.

(10) And respondent, by way of recrimination, avers that said complainant hath constantly since, and during the entire period of his cohabitation with her, at intervals, committed fornication at divers times and places with divers and sundry men whose names to respondent are unknown, but he particularly sets forth and avers that during the entire year of 1875, and the first six months of 1876, said complainant was in the habit of meeting one Phares W. Gorgas at an assignation house at No. — State street, Chicago, every week and sometimes more frequently, and of having sexual intercourse with him at each and every one of said meetings; also that complainant did, on the 25th day of December, A. D., 1877, commit the crime of fornication with one Vincent Bellamy, in the city of Milwaukee, Wis., at a place to defendant unknown.

(11.) Without this, that there is any other matter or thing necessary to be answered unto, and not herein well and sufficiently answered: and now having fully answered, he prays to be dismissed with costs.

JONAS P. FLICKER.

EPH. HUTTON, *Solicitor for defendant.*

JOHN PARKER, *of counsel.*

XXXVI.

OF THE COURTS.

As a rule, courts of general jurisdiction, the highest *nisi prius* courts, are entrusted with the jurisdiction of divorce cases, although it is competent to vest inferior courts with it, as is done in Vermont. These courts have different names in different States.

In Maine, the Supreme Judicial court, sitting in the county in which either party resides.

In New Hampshire, the Supreme court of the county which either party resides.

In Vermont, the County court of the county in which the plaintiff has resided one year prior to the institution of the suit, where divorce is sought for adultery, intolerable severity or wilful desertion, where the cause accrued out of the State. In other cases, in the county where either party resides.

In Massachusetts, in the Superior court in the county in which one of the parties live, except that when the libellant has left the county in which the parties have lived together, the adverse party still living therein, the libel shall be heard and determined in that county.

In Rhode Island, the Supreme court of the county in which the plaintiff resides.

In Connecticut, in the Superior court.

In New York, in the Supreme and Superior city courts.

In New Jersey, in the court of chancery.

In Pennsylvania, in the court of common Pleas.

In Delaware, in the Superior court in the county where plaintiff resides.

In Maryland, in a court of equity where either party resides.

In District of Columbia, in the Supreme court (not of U. S., but) of District.

In Virginia, in the Circuit and Corporation courts, (chancery side), in the chancery district in which the defendant resides, or in the district in which the parties lived when the separation occurred, but if the defendant is a non-resident of the State, then in the district in which the other party resides.

In West Virginia, in the Circuit court (chancery side), same as to locality as in Virginia.

In North Carolina, Superior court in the county where the plaintiff resides.

In Georgia, in the Superior court in the county where the defendant resides, or if he or she be a non-resident, in the county in which the defendant resides.

In Florida, in the Circuit court.

In Alabama, in the Court of Chancery, in the Chancery district in which the defendant resides, or in the district in which the parties lived when the separation occurred, but if the defendant is a non-resident of the State, then in the district where the other party resides.

In Mississippi, in the Court of Chancery, in the same district as the preceding.

In Louisiana, in district courts and parish courts in the domicil of the defendant.

In Texas, in the District court in the county in which the complainant has resided for six months prior to the institution of suit.

In Arkansas, in the Circuit court (equity proceedings) in the county where plaintiff resides.

In Missouri, in the Circuit court where the plaintiff resides.

In Iowa, District or Circuit courts (equitable proceedings), in the county where either party resides.

In Minnesota, in the District court of the county where either party resides.

In Ohio, in courts of Common Pleas in the county where the plaintiff resides, or where the cause of action arose.

In Indiana, in Superior and Circuit courts in the county in which the complainant has resided for six months prior to commencement of suit. In Illinois, in the Circuit court where plaintiff resides, and Superior court of Cook county.

In Michigan and Wisconsin, Circuit court, as Court of Chancery, in county where either party resides. In Kansas, in District court in the county where the plaintiff resides. In Nebraska, in the District court where either party resides. In the Dakotas, in the District court. In Colorado, in District court, sitting as a Court of Chancery, also County court when alimony asked does not exceed $2,000. In California, in Superior court. In Nevada, in District court, in the county in which the cause for divorce occurred, or in which the defendant or plaintiff shall reside, if the latter be the county in which the parties last cohabited, or in which the plaintiff shall have resided six months prior to the suit. In Oregon, in the Circuit court. In Washington, in the District court in the county in which the plaintiff resides. In Montana, in the District court, sitting as Court in Chancery. In Idaho, in the District court. In Wyoming, in the District court in which either party resides. In Utah, in the District court in the county in which the plaintiff has resided one year prior to commencement of proceeding. In Arizona, in the District court in the county in which the complainant has resided for six months prior to the institution of suit. In Kentucky, in courts of general equity, jurisdiction in the county where the wife usually resides, but, when she is a non-resident, where the plaintiff resides. In Tennessee, in Circuit and Chancery courts, in the chancery district in which the defendant resides, or in the district in which the parties lived when the separation occurred, or, if the defendant is a non-resident of the State, then in the district in which the other party resides.

XXXVII.

ALIMONY

is "a provision for support which a husband may be adjudged to make to his wife, when she seeks a judicial separation or divorce." It is *temporary*, otherwise called alimony *pendente lite*, when it is ordered at the institution or during the pendency of a suit for temporary support; it is *permanent* when made for continuous support in the future, upon or after decree. It includes all allowances, whether annual or in gross, made to a wife upon a decree of divorce.[1] It has been defined to be "the allowance to be made to the wife for her maintenance, either during a matrimonial suit or at its termination, when she has proved herself entitled to a separate maintenance. Alimony, although it properly signifies nourishment or maintenance, when strictly taken, yet now, in the common legal and practicable sense, signifies that proportion of the husband's estate which the wife sues to have allowed her from his present subsistence and livelihood, according to law, upon any such separation from her husband as is not caused by her own elopement or adultery."[2]

Notwithstanding this general rule, there are numerous exceptions in our practice, and it is held that even where the divorce is for the wife's fault, yet that court may nevertheless enter a decree for alimony, the amount dependent upon the equities of the case. It has been allowed in Illinois even in a case of bigamy; in Nebraska in all cases except adultery.[3]

Alimony *pendente lite* continues during the pendency of

[1] 107 Mass., 428. [2] Shelford on Mar. and Div., 586. [3] 79 Ill., 74. 28 Ind., 291. 36 N. H., 240. 8 Yerg., 67. 76 Pa., 357. 4 Fost., 564. 108 Ill., 120. 9 B. Mon., 295. 11 Ala., 763. 26 Ind., 189. 59 N. H., 23.

the suit, and permanent alimony commences either at the entering of the decree of divorce, or at some antecedent period retroactively, and continues *during the joint lives of the parties;* hence it ceases at the death either of the husband or wife.[1] 66 How. Pr., 346.

But when a decree expressly stated that alimony was to continue during the natural life of the wife—*held*, that it so continued even after the husband's death.[2]

Alimony is, in general, an incident to a divorce, even to a suit for divorce, whether it be granted or not; but, suits for alimony, or separate maintenance, are, in some States, authorized without any proceedings for a divorce; and, in a divorce *a mensa et thoro*, the principal consequence is alimony.[3] In a suit for divorce by the husband, the wife may file a cross-bill for separate maintenance;[4] and, in the noted case of Speight vs. Speight, in the Superior court of Cook County, Illinois, in which I filed a bill on behalf of the husband for divorce, the wife filed a cross-bill for separate maintenance, and I was defeated; but she prevailed, and would have continued to draw alimony until the husband died, had I not devised a way to avoid it. Under no circumstances can the wife be required to pay alimony to the husband. The proportion of the husband's property or income, which is allowed to the wife as alimony, either *pendente lite*, or, after the termination of the suit, is in the discretion of the court.[5] And, in fixing upon the amount which is proper to be allowed, the court must take into account the nature of the husband's means, the situation of the parties in society, the amount of the husband's income; and, whether the same is derived from property already acquired, or from his own personal and daily exertions.[6] It is also proper for the court to take into consideration the question whether there are, or are not, children, or other relations of the husband, who have claims

[1] 9 N. H., 309. 7 B. Mon., 49. 6 H. & J., 485. 6 W. & S., 85. 3 Dana, 28. 4 Iowa, 509. 9 B. Mon., 294. 15 Abb. new cas., 434. [2] 77 Me., 373. 107 Ill., 620. [3] Hayw., 482. 4 H. & M., 507. 3 Dana, 28. 2 Des., 45. 50 Missis., 694. 84 Ala., 363. 66 Iowa, 378. 9 Colo., 133. 38 Cal., 265. 125 Ill., 510. 1 C. E. Green, 162. [4] 76 Ga., 319. [5] 1 Johns. Chy., 450. [6] 3 Paige, 270.

upon him for sustenance or education. By the practice of the Ecclesiastical courts in England, the allowance to the wife, as well for temporary alimony, pending the suit, as for the permanent provision on the decree of separation, is settled upon what is technically called an allegation of faculties. The allegation embraces, not only a statement of the extrinsic property, but, also of the casual income of the husband, and both are taken into consideration in fixing the amount. And the court, in settling the amount of alimony, also takes into consideration the ability of the husband to provide for himself and family by his own exertions. [1]

Where the amount of the estate is considerable, it is usual to allow the wife, for permanent alimony, one-fourth to one-half thereof, where she is not to have the custody of the children of the marriage. And * * where there were no children to be provided for, the court allowed the wife one-third of the gross value of the property, in the shape of an annuity, which was equal to about half of the annual income during her life. [2] But the alimony which is allowed to the wife for her support during the pendency of the suit, is always allowed in a much smaller proportion than that which is assigned to her as a permanent provision, after she has established the fact of such misconduct of the husband so as to entitle her to a divorce or separation. Alimony will be granted in proportion to the wants of the party asking it, and the ability of the person who is to pay it. [3] The allowance depends upon the judicial exercise of discretion. The faculties, separate property, and income, or earnings, of the wife, are to be taken into account in decreeing alimony, and she will not be allowed anything if she has an ample and necessary support of her own. [4] Parties may agree upon amount of alimony, and, if fair and equitable, such agreement will be upheld. [5]

Although no provision for alimony and support of chil-

Paige, 261. [2] 1 Paige, 246. [3] 22 Ill., 425. 8 B. Mon., 50. 7 Hill, 207. 4 How. Pr., 160. 9 Duer, 102. 3 Abb. Pr., 144. [4] 25 Ind., 156. 27 Wis., 531. 2 Phillim., 40. 22 Ga., 31. 3 Swab. & T., 249. [5] 5 Paige, 509. 25 Minn., 72. 125 Ill., 608. 70 Cal., 619. 65 Iowa, 255. 25 O. S., 596. 77 Me., 373.

dren was made in the judgment of divorce, it may be made afterward.[1]

A court of chancery has power to grant alimony to a wife in Virginia, even without a contract for separation, when the misconduct of the husband is such as to render it unsafe for the wife to live with him, or he turns her out of doors without a support. But no claim for any specific property.[2]

A divorce suit, notwithstanding final decree, is always open to hear motions concerning alimony, or custody, or support of children, and changes therein may be made from time to time, according to the changed conditions of either of the parties. If the husband waxes richer, or the wife grows, from illness or otherwise, more necessitous, the amount may be increased, or, under adverse circumstances, may be diminished. As a general rule, the husband's denial of the charges, or the wife's prostitution or remarriage, will not bar a claim for temporary alimony. A lunatic or idiotic husband must pay alimony also. The charge against the husband, if sustained, will have a share in determining the amount of permanent alimony. If he has been extremely flagitious, the amount will be in proportion to his marital guilt. Upon a similar principle, the wife's demeanor will be considered. If her marital conduct has been exemplary, it will enhance the amount. If she has acted ill, as in not taking good care of her home, being abusive to her husband, denying him the sexual contact, etc., the allowance will be lessened. So if she has been long patient under ills, the amount will be enhanced.[3] The condition and station in life of the husband is an important element to be considered. The wife has a right to live in a style befitting the income and wealth of the husband, despite his niggardly habits or lack of gentility. She is responsible for the appearance of the home, and he must furnish the means in harmony with, not his wish, but, his ability, to do so. The wife has even

[1] 64 Wis., 253. [2] 4 Rand, 662. [3] 69 Wis., 419. 104 Ill., 126. 2 Tenn. ch., 1. 7 Hill, N. Y., 207. 2 Johns. ch., 391. 4 Des., 183. Clarke, 151. 15 Ill., 145. 1 Paige, 274. 4 Litt., 251. 36 Ala., 391. 5 Dana, 499. Clarke, 151. 7 Grant ch., 109. 79 Ind., 558.

been allowed to travel for her health, at the husband's expense.[1]

There is no settled rule in this country as to the amount or rate to be allowed for alimony.[2]

Conflict of authority as to whether remarrying stops alimony.[3] Probably does not unless second husband was amply able to support the wife.[4] As a rule, the court cannot allow a gross sum for alimony, but must allow current payments.[5] In some States, however, statutes have authorized a gross sum.[6] I elsewhere show, and may mention, that an *ex parte* divorce, or one where the party was not served or did not appear, will not authorize a decree for alimony, except to operate on property within the jurisdiction of the court.[7] The decree of divorce or of nullity operating upon a matrimonial *status* is *in rem*, but a decree whose terms require an assault upon the property, must be *in personam*, hence must have jurisdiction of the person to be charged. When the court has jurisdiction of the person, either by personal service within the State or by an entry of appearance, in such case, a decree for alimony may be made which will have exotic and esoteric force, and may be enforced like any other judgment: but when there is no jurisdiction of the person, a decree of alimony, except as aforesaid, is a nullity. No alimony, except *pendente lite*, will be allowed for a void marriage, except by special statute, which obtains in some States. It has been held that a wife committing adultery after decree, did not lessen her right to the continued payment of the alimony.[8]

Where an appeal is taken, the alimony is continued. If a wife is living in a state of adultery with a paramour, no alimony will be allowed her.

The method devised in order to determine the amount of the alimony, is to make a reference to a master to take

[1] 4 Sandf. ch., 373. [2] 2 Barb. ch., 72. [3] 43 O. St., 499. 10 Gray, 222. [4] 7 Bradw., 524. 24 Ark., 522. [5] 10 C. E. Green, 548. 144 Mass., 278. 7 Dana, 181. [6] 6 Har. & J., 485. 4 Hen. & Munf., 507. 47 Vt., 667. [7] 48 Ind., 200. 49 Ind., 386. [8] 4 Hayw., 75. 3 Halst. Chy., 98. 23 How. Pr., 189. 8 Bosw., 640.

proofs and report findings. The court will give effect to the master's report, unless it is very objectionable or excessive.

The extra-territorial effect of a decree for alimony is denied in the following terms, by Judge Cooley: " * in divorce cases, no more than in any other, can the court make a decree for the payment of money by a defendant not served with process, and not appearing in the case, which shall be binding on him, personally. It must follow in such a case, that the wife, when complainant, cannot obtain a valid decree for alimony, nor a valid judgment for costs. If the defendant had property within the State, it would be competent to provide by law for the seizure and appropriation of such property under the decree of the court, to the use of the complainant, but the legal tribunals elsewhere, would not recognize a decree for alimony or costs, not based on personal service or appearance. The remedy of the complainant must generally, in these cases, be confined to a dissolution of the marriage, with the incidental benefits springing therefrom, and to an order for the custody of the children, if within the State."[1] A less allowance is authorized as temporary, than for permanent, alimony, because the merits of the case cannot be known in time for the award of the former; and besides (as once stated by a court), "the allowance should be made with some reference to her former comfortable state, yet with moderation, because the bringing of the suit itself casts on her a shadow which should cause her to live in comparative seclusion, and consequent economy, until it is removed." "On that account," said he, "a comparatively small allotment is given during the pendency of a suit." An allowance of one-fifth of the joint income, first deducting the wife's separate income, has been sometimes adopted, but generally the allowance is according to the situation and circumstances of each specific case.

[1] Const. Lim., p. 406. 47 Vt., 667. 48 Ind., 200. 49 Ind., 386. 21 Ind., 321. 11 How. U. S., 165. 17 Wall., 521. 1 Johns., 424. 9 Greenl., 140. 4 Barb., 295. 1 Gill & J. 463. 7 Dana, 181. 21 Ind., 321. 76 N. Y., 78. 101 N. Y., 23. 108 N. Y., 628. 15 Johns., 12. 6 Wend., 447. 13 Wend., 407. 12 Barb., 640. 31 Barb., 69. 41 N. Y., 272. 46 N. Y., 30. 42 Barb., 317.

"Suit money," or "costs," is a separate allowance, and so, also, is solicitor's fees, and both are allowed in addition to alimony; but while the tendency of the wife is to extravagance in that particular, the practice of the courts is toward economy,[1] and I have known of only ten per cent. to be allowed of the claim made. A motion for alimony *pendente lite*, should include that, also, for the above. In Connecticut it has been held that the allowance for alimony shall not exceed one-third of the husband's estate. In Louisiana, it is enacted by statute that the alimony shall not exceed one-third of the husband's income; and it is further provided that "the alimony shall be revocable in case it should become necessary, and in case the wife should contract a second marriage."

A husband is bound to pay for the services of his wife's attorney in a suit for divorce against him, although the divorce was refused, if the attorney had reasonable grounds to believe her entitled to the divorce.[2]

In fixing the amount to be allowed to a wife for procuring counsel, only necessary litigation should be provided for. Ordinarily, an allowance for one attorney only is sufficient.[3]

In Iowa, Massachusetts, New Hampshire, Oregon, Virginia, Washington and West Virginia, an allowance in the nature of alimony may be allowed to the husband, to be paid out of the wife's separate estate. The following authorities assert the doctrine that courts of chancery, in the ordinary exercise of chancery jurisdiction, even if there be no statute on the subject, will entertain a proceeding for alimony, viz: 16 Ala., 440. 38 Cal., 265. 2 Des., 45. 4 Des., 33. 2 Bland., 544. 4 Har. & McH., 477. 2 Johns. Chy., 391. 3 Dana, 28. 4 Dana, 308. 4 Lit., 202. 3 Ala., 187.[4]

[1] 93 Mo., 520. 2 Barb., Chy., 146. Walker, Mich., 421. [2] 65 Iowa, 285. [3] 51 N. Y., Sup. Ct., 361. [4] 7 Ben. M. 424. 1 C. E. Green. 162. 4 Rand., 662. 4 H. & M. 507. Wright, 682.

XXXVIII.

CHILDREN.

The children who are born of a voidable marriage are legitimate. But if a sentence of absolute *nullity* is pronounced, they are rendered illegitimate. If it is merely *avoided*, their status is not disturbed or changed. The rule of common marital law is, that if a man marry a woman who is with child, a presumption is created that the child with which she is pregnant, was begotten by him. This presumption is founded on the assumed acknowledgment of paternity by the fact of marriage. It may indeed be rebutted, but till overthrown, it holds good. If the child is born soon after marriage the presumption is strengthened, but if the child is born so long after marriage that it could not have been visible or apparent at the time of marriage, such presumption is visibly weakened.[1]

A child of an inchoate marriage of infants is illegitimate if the husband is too young to procreate—*prima facie* if under fourteen. In some cases by statute, children of insane persons are legitimate, but generally not so.

When there is a prior marriage undissolved, and then a second marriage, it being of course void, the children of such marriage are illegitimate, nor are they any more legitimate, by reason that the second marriage was innocently contracted. They are made legitimate, however, as to the one having no disability, in many States. Most of the States have legislated on the general subject. In *Illinois*, children are not affected, except when they are the product of a second marriage while there is a prior subsisting one. In Indiana

[1] 3 Allen, 605.

they are not affected by anything except that in case they are the product of a second marriage, while the first or a prior marriage is valid and was known to the mother both to exist and to be valid, then, and only in such case, are they illegitimate. In *Georgia* the only children of a marriage who are illegitimate, are those born when the pregnancy existed before marriage, and not acknowledged by the father. In *Dakota* the legitimacy of children is not affected except that, when adultery of the wife is charged and substantiated, it is left for the court to decide if any children who may be conceived after the adultery existed, were spurious or the genuine children of the husband; and, in such inquiry, the absence of the husband at the time of conception, or his non-access to the wife, or his inability from illness to procreate, the likeness or non-likeness of the child, or any other apt circumstance, may be considered. In the *District of Columbia*, children are legitimate in all cases, even in case of a prior marriage, if the second marriage was contracted in good faith, and without knowledge of the prior marriage. In *Michigan*, a divorce for adultery does not affect the legitimacy of the children, but, if questioned, may be determined on proofs. The legitimacy of those begotten before proofs, presumed. In case of a dissolution of marriage by reason of non-age, insanity or idiocy, the issue of the party capable of contracting, is legitimatized. In case of prior marriage, if the second marriage was entered into in good faith, the heirs of the party who was capable of entering into the marriage contract are legitimate. In *Massachusetts* a divorce for adultery of the wife will not affect the legitimacy of the children, but if questioned, may be heard on proofs. In *Maine*, the issue of a marriage, void on account of consanguinity or affinity, or by reason that one of the parties was a negro, mulatto or Indian, are illegitimate, but of a marriage dissolved by reason of the idiocy or insanity of one of the parties, the issue of the one capable of consenting, is legitimate. And in a bigamous marriage,

though in good faith and without knowledge, the issue begotten before suit brought, is legitimate of the one capable of contracting. In *Pennsylvania*, children of a valid marriage, born during marriage, continue legitimate. In *Ohio*, the granting of a divorce and the dissolution of a marriage, shall not affect the legitimacy of the children. In *Tennessee*, the dissolution of a marriage is held not to affect the legitimacy of the children. In *North Carolina*, the children are not illegitimate by the decree of divorce.

In *New York*, children born or begotten before final judgment, in case of an annulment of marriage for prior marriage, where it was contracted in good faith and without knowledge of the former marriage, are the legitimate issue of the party who was competent to contract. "A child of a marriage, which is annulled on the ground of the idiocy or lunacy of one of its parents, is deemed, for all purposes, the legitimate child of the party who is of sound mind." Children of a marriage annulled for force, fraud, or duress, awarded to the innocent party, unless totally unfit. When an action for divorce is brought by the wife, the legitimacy of any child of the marriage born or begotten before the commencement of the suit is not affected by the judgment dissolving the marriage; when the action is brought by the husband, the legitimacy of the children, brought before the commission of the offence charged, is not affected, but, as to any other, the legitimacy may be proved; in absence of proof, legitimacy of all begotten before commencement of suit, is presumed. In *New Jersey*, the children of a marriage, where there is a prior subsisting one, are illegitimate, but, in a divorce for adultery or desertion, the children are legitimate. In *Vermont*, a nullity on account of consanguinity, or affinity, issue illegitimate. Children of a marriage annulled for lunacy or idiocy, are legitimate issue of the sound party. If there be issue of a marriage annulled for force or fraud, they shall go to innocent party, and guilty one may be made to pay for their support. Court may change name of minor children of divorced parties.

In *Texas*, a divorce shall not affect the legitimacy of children. In *Wyoming*, a divorce for adultery of wife shall not affect the legitimacy of children, but such legitimacy may be contested; but such as are begotten before commencement of suit, presumed legitimate, till contrary be shown. Upon dissolution of marriage for non-age, idiocy or insanity, issue legitimate of the sound party; in case of non-age, then of the eldest parent; in case of marriage dissolved by reason of a prior marriage, if contracted in good faith, the issue born or begotten before commencement of suit, presumed to be legitimate issue of party capable of contracting; decree of nullity on account of consanguinity, issue deemed illegitimate.

In *Nebraska*, legitimacy of children, in case of adultery of the wife, may be questioned and determined on proof, but all begotten before suit brought, presumed legitimate till contrary shown. Upon dissolution of marriage for non-age, insanity, or idiocy, the issue will be legitimate of parent capable of contracting; when a marriage is dissolved on account of a prior marriage of either, and it shall appear that the second marriage was contracted in good faith, and with the full belief of the parties that the former wife or husband was dead, the fact shall be stated in the decree of divorce or nullity, and the issue of the second marriage born or begotten before the commencement of the suit, shall be deemed to be the legitimate issue of the parent who, at the time of the marriage, was capable of contracting." All issue of a marriage dissolved on account of consanguinity, or miscegenation, is illegitimate. In *Montana*, the legitimacy of children not affected by a decree of divorce. In *Mississippi*, a decree of divorce shall not render the children illegitimate; but, in case of prior marriage, they shall be illegitimate. In *New Hampshire*, no decree of divorce shall affect the legitimacy of a child born or begotten in lawful matrimony, unless it shall be so expressed in the decree. In *Delaware*, the issue of a marriage annulled for consanguinity, affinity, miscegenation, or where a prior marriage existed, are illegitimate, except that, in the

latter case, they shall be legitimate if the second marriage was contracted without knowledge, and *bona fide*; and, in that case, legitimate of the competent party to contract. In all other cases, legitimacy not affected. In *Idaho*, "when a marriage is annulled on the ground that a former husband or wife is living, or, on the ground of insanity, children, begotten before the judgment, are legitimate, and succeed to the estate of both parents." When annulled on the ground of force, or fraud, the innocent parent gets custody, and guilty party must provide for education. "When a divorce is granted for the adultery of the wife, the legitimacy of children begotten of her before the commission of the adultery is not affected; but the legitimacy of other children of the wife may be determined by the court upon the evidence in the case. In *Alabama*, when a divorce is granted for pregnancy of wife before marriage, the issue is illegitimate. In *Arizona*, a divorce does not affect the legitimacy of children.

In *California*, where a marriage is annulled on the ground that a former husband or wife was living, or on the ground of insanity, children begotten before the judgment are legitimate, and succeed to the estate of both parents. In a decree for adultery of husband, legitimacy of children begotten before commencement of suit, not affected; for adultery of wife, legitimacy of children begotten before commission of offence, not affected, but legitimacy of other children may be inquired into. "All children of a woman who has been married, born within ten months after the dissolution of the marriage, are presumed to be legitimate children of that marriage." In Colorado, legitimacy of children not affected except in cases where there was a prior marriage.

In all other States, it may be assumed, that the principles enunciated in the caption obtained. The children of a void marriage, whether so declared by the court, or not, are illegitimate, except as to the mother, while those born of a marriage which is avoided, or of a marriage which is dissolved, are legitimate. *Oklahoma* is the newest of the territories, yet

it has an elaborate divorce law. When a marriage is annulled by reason of incapacity, for want of age, or understanding, the children are legitimate; when a marriage is annulled on account of a prior existing marriage, all children, born or begotten prior to the discovery of the prior marriage, if the second marriage was contracted in good faith, are legitimate; a divorce granted on constructive notice, by publication, may be opened at any future time, so far as the children are concerned, and a divorce annulled for consanguinity or affinity of parties, the children are legitimate.

As to the custody of children, the general rules are, that, other things being equal, the husband is entitled to the children, but in case of young children, especially girls, who need a mother's care, unless she be an adulteress, drunkard, insane, or otherwise unfit, she will be entitled; grown children will be divided equitably, if both parties are suitable.

When the divorce is granted for the wife's adultery, the husband, ordinarily, will be given custody of the children.[1]

When a separation is decreed, the father has the legal right to the possession of the child, unless he has waived it or lost it by misconduct.[2] It does not follow that the party prevailing shall in all cases, have care of the children; the court in its discretion, consulting the best interest of the children, may assign their custody to the other parent, or, even in some cases, to collateral relatives, or to the grandparents.[3] The interest of the child is the leading, if not the paramount, consideration in determining in whose custody a child shall be placed after a divorce.[4]

As between parents living in voluntary separation, the court looks at the character of the parents and their respective merits in regard to the separation, and also, especially, to the welfare of the children. The court prefers the father.[5]

The father's right to the possession, care and control of his minor child is paramount if the child be of such an age

[1] 17 Abb. New Cases, 236. [2] 11 Ill., 43. 2 N. J., 286. 1 Carter, 171. 24 Barb., 521. [3] 28 Miss., 91. [4] 14 Cal., 512. [5] 35 Barb., 85.

that it can without injury or violence to nature be withdrawn from maternal nursing.[1]

A decree of divorce giving the custody of the children to the mother because of the unfitness of the father, and allowing a sum in gross as her alimony, does not impose the obligation of the father to support them.[2] As a general rule the father is entitled to the custody of the infant child.[3]

The tendency of the law is to legitimize children who would otherwise be bastards when it is possible: and, accordingly, in California, Dakota, Florida, Idaho, Iowa, Maine, Michigan, Minnesota, Montana, Nevada, Oregon, Pennsylvania and Washington, illegitimate children are legitimized by the marriage of parents; and when, in addition, they are acknowledged by the father, they are legitimized in Alabama, Arizona, Arkansas, Colorado, Connecticut, Georgia, Illinois, Indiana, Kentucky, Louisiana, Maryland, Massachusets, Mississippi, Missouri, Nebraska, New Hampshire, New Mexico, Ohio, Texas, Vermont, Virginia, West Virginia, Wisconsin and Wyoming.

The children of parents who are divorced, do not lose their standing as heirs at law of both of their parents. If a parent is divorced by a valid divorce, and forms a new alliance, and has other children and dies, the children of both marriage share alike *pari passu*, in like manner as if the first wife died; but if the first divorce was void or fraudulent and the parent marries again, then the issue of the second marriage are not legitimate heirs, and in a contest between the first children, or even collaterals, and the children of the second marriage, the former will prevail. The process would be for the genuine heirs to proceed to assert their heirship in any apt way, as ejectment, bill to remove cloud, or otherwise, and if the spurious decree was set up to their prejudice, then to make and enforce an issue on its invalidity.

[1] 4 Greene, 216. [2] 47 Ill. 290. [3] 1 Bush., 15.

XXXIX.

PROPERTY RIGHTS.

A divorce ends all rights, not previously vested. Interests which might vest in time, upon a continuance of the marriage relation, are gone. A wife divorced has no right of dower in his property; a husband divorced has no right by the curtesy in her lands, unless the statute authorizing the divorce specially confers such right; the general rule being, that no dower accrues to a woman unless she was the wife of the party at his death. She is not entitled to it if a divorce has occurred between the parties, in absence of a statute.[1] In some cases, statutes provide, that when the wife is the innocent party in a divorce decree, she may have dower, to be admeasured at the date of decree, as if the husband was dead. And a husband's rights the same. At the time of marriage he becomes tenant by the curtesy *initiate*, and at the death of the wife he becomes tenant by the curtesy *consummate*; but if divorced, his curtesy never becomes *consummate*, not being the husband, and her lands are divested of his estate by curtesy at time of divorce, and become her own absolutely. So also the husband has no rights to the wife's choses in action or personal property, after divorce.

A decree obtained by fraud, is void, and changes no status of persons or of property, but it may not be known if it was obtained by fraud till so decided by a proper court; usually if adjudged void, it becomes void *ab initio*, but some statutes have held that a decree may only be void from date of decree. This is a solecism in jurisprudence which probably will not

[1] 125 U. S., 216.

stand, but is the law in some jurisdictions at present. The phrase "void" signifies *emptiness*, or *nothing*, or, as has sometimes been stated, a void decree is no decree at all.

In all such cases, the wife (or husband) and children of a marriage so assumed to be annulled by a void decree still remain, despite such decree, the lawful wife (or husband) and true children and heirs of the hero of the fraudulent divorce, nor does such decree gather strength by efflux of time. A fraudulent decree is no stronger after the lapse of twenty years, than one day. The minor children, as a rule, are without the terms of all statutes of limitation, but *laches* may be imputed to the wife, and also to third persons who may seek to have a void decree of divorce so adjudged, or to be shorn of its force by the courts: and even though a decree may be abstractly void, yet courts may refuse aid on account of the negligence of the parties to assert their rights in time.

Commenting upon a case involving this principle, the Supreme court of Alabama said in Turner vs. Turner, 44 Ala., 437: "The Indiana divorce * * * may protect him upon a charge of bigamy, should he marry again in this State. But without stopping to inquire whether it was obtained by him by fraud, and therefore is vicious on that account or not, it certainly cannot affect the rights of complainant, except her right in the husband, as husband. But it does not settle his right to alimony; it does not settle her right to dower in his lands, and her statutory right to distribution of his property in this State, in the event she should survive him, nor any other interest of a pecuniary character she may have against him."

On a decree of divorce, the court will inquire into waste committed by the husband on the wife's land since the petition, and compensate her for it out of the husband's estate.[1]

A divorce restoring to the wife her lands, etc, divests judgment liens created by the husband, and annuls sales made under such liens.[2]

[1] Harr. Del., 516. [2] 4 Harr. Del., 440.

The rule of equity, which requires, upon the rescission of a contract, that the parties should be restored to their original condition, cannot be applied in case of a divorce *a vinculo matrimonii*.[1]

Upon the dissolution of a marriage by divorce or sentence of nullity, for any cause except adultery of the wife, she is entitled to the immediate possession of all her property in the same manner as if her husband were dead.[2] Upon a divorce for husband's adultery, all the separate rights and choses in action of the wife which had not been reduced to possession by the husband before the commencement of the suit, will belong to the wife, discharged of the claims of the husband in the same manner as if the marriage had been dissolved by the death of the husband.[3] Courts of equity in suits for divorce or separation have the power of restoring to the wife the whole, or a portion, of her property, whenever, from the nature and circumstances of the case, such a decree would be just, and may restrain the husband from receiving gifts or legacies to her after such divorce or separation.[4] A divorce obtained by a wife from her husband places her in the same situation as to her legal rights in reference to property owned by her before marriage, or acquired by her during its continuance, as if she had actually survived her husband.[5] In granting a divorce, the court may make such a division, at least of the community property, in reference to the condition of the parties and the support and education of the children, as may be equitable.[6]

When a husband obtained a decree of divorce from his wife, on the ground of her desertion, she was allowed to retain all the estate of which she was possessed at the time of her marriage, amounting to about $1000, and was decreed $750 out of her husband's estate of $12,000.[7]

Where, in proceedings to obtain a divorce, the question of the rights of the parties to the common property does not

[1] 15 B. Mon., 49. [2] Walk. Mich., 309. 5 Miss., 109. 27 Miss., 630. [3] 10 Paige, 420. [4] 3 Barb., 295. 2 Barb., 377. 6 Paige, 366. 4 Barb., 295. [5] 2 Ashm., Pa., 455. [6] 5 Tex., 18. [7] 6 B. Mon., 496.

come before the court, and the decree is for divorce simply, neither of the parties will be concluded thereby in respect of their claims, otherwise existing, to such property.[1] Where a divorce is granted on the ground of extreme cruelty, the guilty party is entitled to receive only so much of the community property as the court may deem just under the facts of the case.[2] Upon granting a divorce, whether on account of the fault of the wife or the husband, the court has power to award to her the possession of the homestead.[3] Though the District court has authority upon granting a divorce to make partition of community property, yet, if it is not done, the divorce does not preclude the woman from afterward bringing suit to recover her interest in the property.[4] Although a wife, upon obtaining a divorce from her husband for his misconduct, is entitled to be placed as regards her separate property, in the same position, as nearly as may be, as before the marriage, he cannot be compelled to account for rents of her separate property received by him during coverture.[5] The *lex loci*, which is to govern married persons, and by which the contract is to be annulled, is not the law of the place where the contract was made, but where it exists for the time where the parties have their domicil, and where they are amenable for any violation of their duties in that relation.[6]

The divorce obtained by the husband of appellant in Indiana determined the status of the parties, but does not, by its own force, affect the right to property in Kentucky.

The divorce obtained by the husband from the wife can only affect rights to property in the State where granted.[7]

A decree dissolving a marriage for a cause not regarded as adequate by the laws of New York. rendered in another State by a court having jurisdiction of the subject and the parties, in an action brought by the husband, will not deprive the wife of her then existing dower rights in lands in New York, at least in the absence of evidence that under

[1] 39 Cal., 157. [2] 47 Cal., 62. [3] 14 Kan., 342. [4] 48 Tex., 269. [5] 19 Fla., 341. [6] 45 N. Y., 544. Story Conf. Laws, 230. [7] 80 Ky., 353.

the laws of the State where it was rendered, it has that effect.[1]

As to whether even with such evidence, it will have that effect, it is doubtful.

A wife who is divorced from her husband for her own fault or misconduct, forfeits all her dower or homestead rights, regardless of the place where the divorce was granted. This was a case of a divorce rendered in Kansas, while the property was located in Illinois.[2]

Where a divorce was granted to the husband for the voluntary abandonment of the wife, dower to the wife is barred.[3]

By the statute in Kentucky a divorce bars all claim to curtesy or dower. This applies as well to that conveyed during the marriage as to that of which he died possessed.[4]

In a case in Kentucky, the lower court allowed an absolute divorce, and also allowed the wife to hold all property owned by her at the time of the marriage. Review court said: "But the decree is not for alimony, and if it had been such, it would have been erroneous, because it does not secure to the wife, as wife, an annuity or other personal right to maintenance, but it purports to confirm to her as a *feme sole* the absolute title to property, which should never be done in case of mere alimony."[5]

In another case in Kentucky, a fee simple of land was granted by the court as alimony. *Held*, not void, but erroneous.[6] In a case in North Carolina it was held that when slaves were assigned the wife in lieu of alimony it was not an absolute gift, but a mere use, to terminate with the death of either.[7]

And a similar doctrine as to personal property obtains in New Jersey.[8] If a wife sues for divorce and prays that certain real estate be set apart for her support, it will create a *lis pendens*.[9]

[1] 118 N. Y., 449. [2] 118 Ill., 257. [3] 84 Ala., 468. [4] 83 Ky., 208. [5] 7 Dana, 187. [6] 3 B. Mon., 90. [7] 6 Ired., 293. [8] 25 N. J. Eq., 548. [9] 20 Nevada, 232.

Where a petition for divorce, praying that specified property of the husband be assigned to plaintiff as alimony, is endorsed as filed by the clerk, but is immediately taken from the office and no summons issued thereon, there is no such filing as is contemplated by the law of Kansas.[1]

Where a wife, in her petition for divorce, describes certain property of the husband, and prays that it may be set apart to her as permanent alimony, as provided by the Kansas statute, the doctrine of *lis pendens* applies, and any one purchasing the property, pending the suit, will be bound by the judgment subsequently rendered thereon.[1]

[1] Wilkinson v. Elliott, 43 Kan., 590.

XL.

DOWER.

Dower is defined to be that portion of the lands or tenements of a man which his widow enjoys during her life, after the death of the husband; or the portion which the widow has of the lands and tenements of her husband after his decease. At common law it consists of a life estate of all lands owned by the husband at any time during coverture, and not released. At common law, in the absence of statute, it has been generally held that a divorce bars dower, and such is sustained by the great weight of authority in most of the States. Judge Gray held that divorce bars dower unless the same is preserved by the *lex rei sitae*.[1] And it has been held similarly in 27 Me., 212. 6 Watts & S., 85. 2 Greene (Iowa), 604. 6 Ind., 229. 4 Wright's Pa., 157. 11 Wis., 126. 10 Ohio St., 596. 9 C. E. Greene, 440. 81 Ill., 405. 55 Pa. St., 375. 11 Cart., 233. 8 Blackf., 218. 6 Port., 229. 20 Ohio St., 454. 2 Edw. Chy., 592. 24 Wend., 193. 23 Ind., 71. In a case in Oregon it was held that the matter of dower must be adjudged in the divorce suit, and that it could not be done after a decree of divorce.[2] But the more logical doctrine is to file a bill for an admeasurement of dower, when the statute authorizes it, after the divorce is allowed, as if the husband had died.[3]

The *lex rei sitae* governs as to dower,[4] and in a case which arose in the United States court, where a decree of divorce was obtained in California, where dower was allowed by statute, and the dower right was sought to be enforced in Oregon,

[1] 111 U. S., 523. [2] 4 Ore., 30. [3] 55 Me., 370. 13 Mass., 231. [4] Story Conf. Laws, 380.

where it was not allowed by statute, it was denied.[1] A bill to admeasure dower, where it is authorized, can be brought at any time after a decree of divorce, without waiting for the death of the husband. It will be of such lands only as he was seized of during the *coverture*. The bill will lie either before or after the death of the husband.

In a case in Maine, it was held that, where a husband had deserted his wife in Maine, and went to North Corolina, and the wife to Rhode Island, and the wife obtained a divorce in Rhode Island for adultery of the husband committed in North Carolina, the wife had dower in the husband's lands in Maine.[2]

In an application for dower in Ohio, the husband got a divorce from his wife in Kentucky, but the court in Ohio allowed dower.[3]

In a case in New York, the court denied dower,[4] but the Court of Appeals reversed it, saying: "In respect to the husband's property, her rights are not changed. She is still entitled to a support while he lives, and to dower after his death. The children will still inherit as heirs-at-law, and when they inherit, she may be endowed. The only difference is, they inherit the lands not devised of which the father at time of death was seized, while she is endowed of all the lands of which her husband was seized at any time during coverture.[5]

In Kentucky, the statutes provide that, where there is a divorce, it bars any recovery of dower. In Indiana, the statute allows dower in such case. *Held*, in Kentucky, that a divorce granted in Indiana bars the recovery of dower of the husband's lands in Kentucky, because the bar of the statute extends to any valid divorce, no matter where granted.[6]

In New York, it is held that a decree of divorce for a cause not adequate in New York, granted by an Illinois

[1] 6 Sawy., 473. [2] 9 Me., 140. [3] 10 Ohio, 27. [4] 4 Barb., 192. [5] 4 Comst., 109. [6] 80 Ky., 353.

court having jurisdiction of the subject matter and parties, in a suit by the husband, will not bar dower in New York.[1]

The statute of Missouri, barring wife's claim for dower after divorce granted for her fault, applies to all divorces whether obtained in this, or another State, and whether obtained on personal service, or by publication.[2]

The general rule is, that a limited divorce has no effect upon *dower*, but that an absolute divorce terminates it.

Lord Coke states it thus: "It is necessary that the marriage do continue: for if that be dissolved, the dower ceaseth. * * * But this is to be understood, where the husband and wife are divorced *a vinculo matrimonii* * * * and not *a mensa et thoro* only."[3]

The reason is strictly logical; dower is a provision, made by the law, for a support to a widow after the husband's death, and if she be divorced, she is not his widow: hence the reason for the rule ceases, but in this country, the rule is trenched upon and sometimes wholly changed by statute, where the husband is the guilty party, and she is allowed dower, sometimes immediately upon rendition of the decree, and sometimes after death.

In case she is entitled to dower immediately, the same proceedings are had as if the husband was dead. It cannot be awarded by decree in the divorce suit, but demand must be made, and thereafter she may bring her suit for admeasurement of dower; and in case of death, the same proceedings are had as if there had been no divorce.[4]

Like other cases of dower, the wife will be entitled to dower in lands aliened during coverture as to those of which the husband was seized at death.[5] The courts sometimes find difficulty in applying the new rule, for a man divorced is liable to leave more than one widow—he might leave four, in which case, it would be mathematically impossible to award dower to all.

The Supreme court of Alabama was brought face to face

[1] 118 N. Y., 549. [2] 57 Mo., 200. [3] Co. Litt., 32 a. [4] 13 Mass., 231. 55 Me., 370. [5] 9 Greenl., 140. 14 Mass., 219.

with this problem, and in Hinsen v. Bush, 84 Ala., 368, was obliged to expressly overrule Williams v. Hale, 71 Ala., 83, in order to escape from a judicial dilemma: the over-ruled case, allowing dower (there being no survivors, but the divorced wife); and the later case denying dower, there being a legal wife, as well as a divorced one.

If both parties are guilty of misconduct, the wife will be barred of dower. The question of dower is decided, not by the *lex fori*, (when the land is not in the divorced jurisdiction) but by the *lex loci rei sitae*. In Kentucky there is a statute, which bars dower in cases of absolute divorce; and it was held in that State, that a decree of divorce in Indiana, for the husband's fault, and which authorized dower in the latter State, did not authorize dower in land situated in Kentucky.[1]

It is scarcely needful to state that a foreign divorce regarded as fraudulent or invalid, in the State where the land is situated, will not authorize dower.[2]

The husband's interest in the wife's land by curtesy initiate, or special statute, falls by an absolute divorce.[3]

The personal property of either spouse becomes his or her property at divorce, and all right or claim of the other ceases thereover. If, therefore, a husband collects money belonging to his wife after divorce, she may recover it back in an action at law. But, during coverture, in the absence of statute changing the common law rule, if the husband has converted his wife's personalty to his own use, she cannot recover it or its value back.[4]

Unless otherwise provided by local law, a decree of divorce by a court having jurisdiction of the cause and of the parties * * * puts an end to all objections of either party to the other, and to any right which either has acquired in the other's property, except alimony.[5] Accordingly, it has been generally held that a valid divorce * * * for the fault of either party, cuts off the wife's right of dower and the

[1] 80 Ky., 53. [2] 55 Pa., 375. [3] 27 Gratt., 599. [4] 8 Mass., 99. 27 Miss., 630. [5] 10 Mass., 260. 110 Mass., 463. 10 Ohio St., 596. 20 Ohio St., 454. 57 Mo., 200.

husband's tenancy by the curtesy, unless expressly or impliedly saved by statute.[1]

Statutes pretty widely in our States have changed the unwritten law, where the wife is the innocent party in the divorce, by providing that she shall be entitled to dower, in most of the States, immediately, the same as though the husband was dead.[2]

In Kentucky the statute expressly bars dower in a divorce decree. In Pennsylvania and North Carolina dower expressly ceases on a divorce decree. If a divorce be granted for the adultery or imprisonment for three years of the husband, the wife gets dower in Massachusetts, Wisconsin, Minnesota and Oregon. In Michigan, dower is saved if a decree is granted for the adultery, misbehavior, drunkenness or imprisonment of the husband. In Missouri, Kansas, Ohio and Illinois, dower is not barred if the divorce is granted for the fault of the husband. In Maine, it is not lost if the decree is obtained for the fault of the husband, except it be impotence. In Connecticut dower is not lost if the wife be innocent. In Tennessee and Arkansas, wife cannot have dower if the divorce was for her fault. In District of Columbia the court is authorized to grant dower in its discretion.

[1] 111 U. S., 527. 69 Mich., 158. 63 Mich., 257. [2] 18 Neb., 395. 114 Ill., 375. 46 Conn., 15. 59 Me., 488.

XLI.

"VOID," "VOIDABLE" AND "NULLITY."

The word "void" and its significance, meaning and effect is frequently a matter of difficulty. Our most common legal lexicographer defines it in a sentence, as "That which has no force or effect."[1] And, in fact, such is the signification of the term, in popular parlance. But it has been said that "*void* does not always imply entire *nullity*, but it is, in a legal sense, subject to large qualifications, in view of all the circumstances calling for its application, and the rights and interests to be affected in a given case."[2] Again: "Void, in its most unlimited sense, implies an act of no effect at all, a *nullity ab initio*. When used in a statute, in reference to the solemn acts and judgments of superior courts, it may mean no more than voidable."[3] Again: "Probably no words are more inaccurately used in the books than 'void' and 'voidable.'" Statutes not infrequently make acts void which the tenor of their provisions necessarily make voidable only. * * * Whatever may be avoided may in good sense to this purpose be called void. And the use of the term void is not uncommon in the language of statutes and of courts. But in regard to the consequences to third persons, the distinction is highly important, because nothing can be founded on what is absolutely void, whereas, from those which are only voidable, fair titles may flow. These terms have not always been used with nice discrimination. Indeed, in some books there is great want of

[1] Bouvier Law Dict., title Void. [2] 50 N. H., 538. [3] 1 N. J. L., 111.

precision in the use of some of them.[1] Again: "Void probably means of no legal force—null, and incapable of confirmation or ratification."[2]

"The true distinction between "void" and "voidable" acts * * is, that the former can always be assailed in any proceeding, and the latter only in a *direct* proceeding."[3] Again, the term "void" has not, at all times, been used with technical precision, nor restricted to its peculiar and limited sense, as contra-distinguished from voidable, it being frequently introduced even by legal writers and jurists when the purpose is nothing further than to indicate that a contract was invalid, and not binding in law. * * Whenever entire technical accuracy is required, the term "void" can only be properly applied to those contracts (or decrees) that are of no effect whatever—such as are a mere nullity, and are incapable of confirmation or ratification."[4] Again, "many things are called 'void' which are not absolutely so, and, as to mankind generally, are treated as valid. They can only be called *relatively void.*"[5] And one of our most correct law writers has said: "There is this difference between the words 'void' and 'voidable: *void* means that an instrument or transaction is so nugatory and ineffectual that nothing can cure it; *voidable* applies when an imperfection or defect can be cured by the act or confirmation of him who could take advantage of it."[6] Another lexicographer has defined it as meaning: "Of no force or effect; absolutely null; that cannot be affirmed, or made effectual. A thing may be void in several degrees; it may be void as to some persons or purposes, and valid as to others; void things are as no things."[7] "Null, ineffectual, nugatory, having no legal force, or binding effect;"[8] "unable, in law, to support the purpose for which it is intended."[9]

A court may judicially *declare* a void marriage to be void. A learned jurist says: "A *void* marriage imposes no legal

[1] 6 Wis., 645. 40 Wis., 131. 2 Edw. Chy., 289. 18 Johns., 515. 44 Pa. St., 9.
[2] 36 Iowa, 201. [3] 42 Ala., 462. [4] 6 Metc., 415. [5] 50 Mo., 287. [6] Wharton Law Dict.
[7] Burrill Law Dict. tit. "Void." [8] 9 Cowan, 778. [9] Black's Law Dict., tit. "Void."

restraint upon the party imposed upon, from contracting another, though prudence and delicacy do, until the fact is so generally known as not to be a matter of doubt, or until it has been impeached in a judicial proceeding."[1] But it was properly said: "Though a man marries never so often, he can have but one lawful wife living. So long as she is living, and the marriage bond remains in full force, all his subsequent marriages, whether meretricious or founded in mistake, and at the time supposed to be lawful, are utterly null and void."[2] No decree of divorce is necessary to annul such subsequent marriage, for it never had any legal existence.[3] Such was clearly the common law. * A "subsequent marriage was merely void, and needed not any * sentence of divorce. It was void *ab initio*, and so she was always sole." "No person can marry while the former husband or wife is living. Such marriage is, by the common law, absolutely null and void."[4]

A learned jurist has said that: "A thing is void which is done against law at the very time of doing it, and when no person is bound by the act; but a thing is voidable which is done by a person who ought not to have done it, but who, nevertheless, cannot avoid it himself after it is done. * * Whenever the act done takes effect as to some purposes, and is void as to persons who have an interest in impeaching it, the act is not a nullity, and therefore, in a legal sense, is not utterly void, but merely voidable. Another test of a void act or deed is, that every stranger may take advantage of it, but not of a voidable one. * * Again, a thing may be void in several degrees: (1) Void so as if never done to all purposes, so as all persons may take advantage thereof; (2) void as to some purposes only; (3) so void by operation of law, that he that will have the benefit of it, may make it good."[5]

"An act may be void *ab initio* or *ex post facto*." The former is strictly *void*, the latter strictly "*voidable*."[6]

[1] 4 Johns. Chy., 346. 6 How., 592. [2] 22 Ala., 101. [3] Shelf. Div., 480. [4] 2 Kent Com., 79. [5] 18 Johns., 527. [6] Rapalje Law Dict., tit. "Void."

The above definitions will furnish a general idea of the difficulty which besets even a lawyer in attempting to define the concrete signification of the terms indicated, or to determine upon proper action in reference to the same. The statutes of a State have the right, which they frequently exercise, to prescribe what conditions must be observed to form, and what parties may enter into, a valid marriage, and may also declare such and such marriages to be *void*. And they frequently declare that certain assumed marriages are *void* without any necessity for adjudication, and in such cases they are void not only in the place of celebration, but everywhere else: for the rule, which is elsewhere stated, may be restated, that a marriage valid by the law of the place where celebrated is valid everywhere, and that a marriage which is *void* by the law of the place where celebrated, is *void* everywhere.

In reference to divorces, the matter becomes more difficult of consideration. From the very nature of the case, a second marriage contracted by a party who is already married and undivorced, must necessarily be *void*, without any decree or necessity for court proceedings, and the only necessity on the part of any for a decree declaring such second marriage void, would be to spread it of record while the evidence was obtainable. But if the party thus polygamously inclined, should have procured a spurious divorce from the first marriage, although such spurious divorce would be *void*, yet, if properly of record, it might be valid in *form*, although void in *fact*, and would need a court decree to annul it, before its being *void* would be available.

The "Utah" decrees were somewhat different from those of other jurisdictions in this respect, viz.: That the "Utah" decrees, on their face, showed that the plaintiff never resided there. They were thus *ipso facto* void, and fell by their own weight. But when a decree itself recited apt and proper jurisdictional facts which needed evidence *dehors* the record to controvert, in such case, such decree could

only be, in effect, voidable, although easily avoided: and when avoided, would be void *ab initio*.

In case of miscegenation, in States where a marriage between a white and a black, or a mulatto, etc., is declared to be *void*, it is apparent that a judicial investigation is needful to determine if or not the person labors under the disability. A novice in law matters might indeed say that in case of an unmistakable white person and an ebony black one, no legal investigation would be needed—that profert of the parties was sufficient. But the test might be demanded when the parties were not available, or were dead, and profert could not be had, i. e., the party under disability might have run away, etc. In such cases, there are two conditions needed to concur: First, That one party be colored, and second, that the other party be *white*, and then there are sub-controversies, even here, as the degree of color, etc., and, as I have intimated, a question of property might arise after the colored party was dead. Another difficult question will arise in case of impotence. In some jurisdictions these marriages are declared to be *void*, but the fact of impotency is concealed and must be decided by a judicial inquiry. In case of a marriage of a lunatic being *void*, the fact of lunacy may indeed be of record in the court of lunacy, but there is no connection or adhesion between the lunatic thus adjudged, and this marriage, and a judicial proceeding will be necessary to establish it. Similar remarks will apply to cases within degrees of consanguinity and affinity. The fact may be well known that an uncle has married his niece, or a brother his sister, but the court must know it judicially, by evidence arrayed in the proper way: and similar suggestions may be made in reference to force, fraud, duress, non-age, lack of parental consent, etc.

Even thus, in cases which are declared to be void *ipso facto* without the intervention of legal proceedings, it is, nevertheless, well to bring suit and spread it of record as I have said, in order to define the parties and make that

concrete which before was *abstract*. But there are other cases where the court must declare a decree to be *void* before it will be so, and, until so declared, the decree is valid. Moreover, in some States, it is expressly adjudged that, in some cases, although a decree may be adjudged to be *void*, yet that it shall be *void* only from the date of the decree, and, in such cases, all consequences attaching to a *valid* decree do thus attach until so declared void.

When the courts of one State declare and adjudge that the decree of another State shall be a nullity, they mean that it is a nullity so far as the former State is concerned, and, if the former decree is regular, this State cannot annul it even for effect in its own jurisdiction, except on the ground of fraud, or the jurisdiction, because, unless that intervenes, the Constitution of the United States requires the "full faith and credit" to give to the record in the original State.

It consequently follows that the courts of one State might nullify the decree of another, and still another State uphold it. The Supreme court of the United States, in Cheever v. Wilson, sustained an *Indiana* divorce; while the Supreme court of Michigan, in People v. Mawell, otherthrew a similar decree. In like manner, New York, in case of Kinnear v. Kinnear, sustained a foreign decree,[1] while, in case of the People v. Baker, they overthrew it.[2] In a case divested of fraud, it would be obnoxious to the constitution of the United States to nullify a *bona fide* decree; but the State courts claim great latitude in the inquiry whether a decree of another State is fraudulent. The four cases just cited are suggestive, as showing the glorious uncertainty of the law when diverse jurisdictions are concerned, and, also, as showing of how little avail a decree of one State is in another State which chooses to disregard it. In New York, it has been held that a judgment for divorce, rendered by a court having jurisdiction of the parties and subject matter, cannot be at-

[1] 45 N. Y., 535. [2] 76 N. Y., 78.

tacked for alleged fraud in its procurement, in an action by a subsequent husband of the divorced wife, seeking to have *his* marriage declared void on the ground that the former marriage is still of force, and the former husband still living.[1] And any one legally interested in property rights, as well as the parties themselves, may avoid the force of a fraudulent decree, and have it annulled as far as they are concerned.

A decree of divorce, properly considered, assumes that the parties were lawfully married, and so remained to the date of the decree.

A decree of nullity proceeds upon the theory that no valid marriage ever took place between the parties.

If the defendant had already a husband or wife living, the second (so-called) marriage would be null and void, as well without a decree as with it; nor would it be made valid (in the absence of a statute) if the former husband or wife should die; in that case, there must be a new ceremony. In all cases of a void marriage, the issue would be illegitimate, in absence of a statute. A marriage, merely voidable, will have all the incidents of a valid marriage, until vacated by suit and decree; when thus done, it will be void from the beginning.

Marriage between persons inhibited by consanguinity and affinity, are voidable, but not void. So, likewise, of the inherent defect of impotence; all the incidents of marriage are attained in a marriage which is merely voidable, and, if never set aside by decree, it is as if it was an indefeasible union. But if annulled, it is regarded, in the absence of an express statute to the contrary, as a marriage void from the beginning; there is no dower, curtesy, nor alimony; the children are illegitimate; the wife may sue for services, as if she had been a hired servant, and she may recover back any property which the husband has converted to his use during the union: the seal of confidence is even removed from

[1] 45 N. Y., 535. 21 Hun., 489.

any communications which may have taken place between them during the continuance of the married state.

While the most cogent reason for a suit to annul a marriage is to destroy a voidable one, yet it is often of importance to spread upon record, and confirm by judicial decree, the facts of a void marriage. It has been held that, although a statute may denominate the proceeding to declare the union null a "*divorce*," yet, that in a case proper for nullity of the marriage bond, all of the proper incidents obtain, notwithstanding the nomenclature.

By reference to the statutes of the various States, it will appear that in some States, an assumed and ceremonial marriage is declared to be *void* without any decree or action of a court, and it is so *ipso facto* in every such case; but even then, the office of a court may be secured, if desirable, in order to make the nullity a matter of judicial record for safety or convenience. In other cases the statute absolutely prohibits certain classes from inter-marrying, as whites and blacks, and in such cases, even though the prohibited parties have gone through the form of marriage, it is a nullity.

There are yet other cases where the law makes a marriage void, but a judicial investigation is needful to determine if the facts exist, making it void. As already discussed, a marriage between a typical African and a typical Caucasian would require no judicial investigation, but a marriage between persons partly white and partly black might require such investigation. So of persons impotent, idiotic, insane, within prohibited degrees, etc.: and all that be properly said of a marriage which needs investigation, is, that such a marriage is voidable. When a decree is obtained, it avoids it *ab initio*, except where otherwise provided. But a merely *voidable* marriage, i. e., one where it is voidable at the parties' election, will be valid till avoided. So, also, will those cases where the legislature declares that a void marriage shall be valid till decree of nullity. Thus it will appear that there are two kinds of *void* marriages—one where they are void in-

herently, and one where they are void at the election of the parties, and the former class may in *result* not be void, because no one moves in the matter. There is obscurity and difficulty frequently in a practical application of the subject, and, in some cases, judicial interpretation is required.

In *Maine*, a marriage is void within prohibited degrees; for insanity or idiocy; former husband or wife living; between white and black, mulatto or Indian; where either was under the age of consent. All of these, except former spouse living, are merely voidable. If parties continue to live together through life, the usual incidents of marriage obtain. In *New Hampshire*, a marriage solemnized within the State, within the prohibited degrees, is voidable, and when former husband or wife living, if known to party, is void. In *Vermont*, if solemnized within the State, is voidable if within the prohibited degrees, and void if bigamous. If either party was under the age of legal consent, and they have not freely cohabited after attaining full age, it is voidable at election of infant party; for idiocy or lunacy, unless lunatic was restored to reason and parties freely cohabited thereafter; for impotency, if brought by the sound party within two years; force or fraud, unless parties voluntarily cohabited together. In *Massachusetts*, marriages are void without legal process within prohibited degrees, if solemnized within the State; bigamous, idiotic or insane, or where either party was under the age of legal consent, if the parties separate during non-age and do not cohabit thereafter. In *Rhode Island*, marriage within prohibited degrees, idiocy or lunacy or bigamous, are void. In *Connecticut*, marriage within prohibited degrees, bigamous, or when celebrated by unauthorized person, are void. In *New York*, a marriage within prohibited degrees is void, or if former husband or wife be living, unless he or she shall have been absent, unknown for five successive years, in which case the second marriage shall be good until declared void by competent authority; where either party is incapable from want of age or understanding, if suit brought

by party under age; not void, however, if parties freely cohabited after age of consent was reached, nor by female under 16, if she had parental consent, and even then only void from date of decree; voidable for impotence if incurable and action brought by sound party within two years, and then decree only good from date of decree; void also for force or fraud at suit of injured party unless they voluntarily cohabit, and, if pronounced void, then only from date of decree. In *New Jersey*, a marriage is void if against the will of a female, or if she was under 15 years of age, without parental consent, or for impotency, or when it is bigamous. In *Pennsylvania* it is void within prohibited degrees (but can not be questioned after death of party), or bigamous. In *Delaware* a marriage is void within prohibited degrees, between white and black or mulatto, bigamous, party insane, or when solemnized by unauthorized person, and marriage with a pauper prohibited. In *District of Columbia* marriage is void if bigamous, or within prohibited degrees. In *Maryland* a marriage is void if bigamous, within prohibited degrees, or between white and persons of negro descent to the third generation. In *Virginia* a marriage is void if bigamous; between a whites and colored person; where either was under the age of consent, if they do not voluntarily thereafter cohabit; or within prohibited degrees; where either party was insane or impotent; if in three last cases marriage was solemnized within the State; and decree to take effect from its rendition, or, in case of prohibited parties, from time of conviction of parties of incest. In *West Virginia*, a marriage within prohibited degrees is void, and voidable from time a decree of nullity is pronounced, when bigamous, or want of age, insane, between white and black, or impotent. In *North Carolina*, a marriage is void within prohibited degrees, bigamous, between a white and a person of negro or Indian descent to the third generation, when either is under age of consent, impotent, lacks will or understanding to marry, or between a Croatian Indian and negro descendant to

the third generation; but no marriage followed by cohabitation, and issue, shall be void for any cause stated, after death of either, except for bigamy, or for miscegenation. In *South Carolina*, a marriage is void if bigamous, or between a white and Indian, negro, mulatto, mestizo or half-breed, and unless consummated by cohabitation; when lacking consent of either party, or for any cause showing that a contract had not been made. In *Georgia*, a marriage is void within prohibited degrees; between whites and persons of African descent, bigamous, within nearness of relationship by blood or marriage, impotency or fraud, unless ratified by cohabitation. In *Florida*, a marriage is void within prohibited degrees, bigamous, or between white and colored in any degree. In *Alabama*, a marriage within prohibited degrees is void, and a bigamous marriage, or when either party is under the age of legal consent, between white and colored to third generation inclusive, or when marriage of female is procured by menace, force or duress. In *Mississippi*, a marriage is void if within prohibited degrees, bigamous, or between white person and a person having one-fourth or more negro blood. In *Louisiana*, a marriage is void within prohibited degrees, or bigamous or voidable at instance of innocent party when obtained by force or fraud, or when mistake in the person. In *Texas*, a marriage is void between whites and negroes or their descendants; for impotence or contract void; marriages are prohibited within prohibited degrees; bigamous; under ages of legal consent; when female is abducted or forced into marriage. In *Arkansas*, a marriage is void within prohibited degrees; between whites and negroes or mulattoes; when either party was incapable of giving consent; impotency; or force or fraud. In *Missouri*, marriage is void within prohibited degrees; between white persons and negroes; bigamous; or when marriage of female is procured by force, fraud or duress.

In *Kentucky*, marriages are void within prohibited degrees: idiocy or lunacy; between a white and negro, or mu-

latto; bigamous; when solemnized by an unauthorized person; under age of consent; procured by force or fraud; without parental consent under sixteen, if male, or fourteen, if female, unless cohabitation after such ages. In *Tennessee*, marriages are void if bigamous; or within prohibited degrees; or when the marriage of the female is obtained by menace, force, or duress; or between a white and colored, to the third generation. In *Ohio*, marriages are prohibited when under age of consent, bigamous, or within prohibited degrees. In *Michigan*, marriages are void within prohibited degrees, or bigamous, if solemnized within the State; when either party was insane or an idiot, if solemnized within the State; and lunatic when not recovered, and afterward cohabited; or, if under age of consent, and parties have not thereafter, after age, cohabited; when consent obtained by force or fraud, and parties have not voluntarily cohabited thereafter; when either party is physically incapable, if suit is brought within two years by party injured; when woman is compelled by force, menace, or duress, to marry against her will. In *Indiana*, a marriage is void within prohibited degrees; bigamous; between white and person of one-eighth or more negro blood; insanity or idiocy; when either is incapable for want of understanding, but the incapable party shall sue; and children are legitimized. In *Illinois*, a marriage is void if bigamous; or within prohibited degrees; either party, insane or idiotic, or obtained by fraud or false personation. In *Iowa*, a marriage is void within prohibited degrees; bigamous; within age of legal consent; impotent; insane or idiotic; or where marriage of female is obtained by force, menace, or duress. In *Wisconsin*, a marriage is void, if celebrated in the State, within prohibited degrees; or bigamous; when either party was incapable of consenting thereto; from want of age or understanding; or when consent was obtained by force or fraud, if there was not, in the two latter cases, subsequent voluntary cohabitation; and, if not, the judgment will be void from date of sentence of nullity. In *Minnesota*, marriages are

void if solemnized within the State, when bigamous; but, if the absent spouse has been absent, without knowledge, for five successive years, it shall be void only from date of decree; also, if solemnized within the State; for being within prohibited degrees; or, when either party is incapable for want of age or understanding, or when consent is obtained by force or fraud, but void only from date of decree; and void only at suit of party under age, unless there has been voluntary cohabitation subsequently; but not for lunacy, if party is restored and free cohabitation had thereafter. In *Nebraska*, a marriage is void within prohibited degrees, or bigamous, or between a white and one having one-fourth or more, negro blood; when either party is insane or an idiot, unless the lunatic is restored and parties have cohabited; when either party is under age of consent, if no cohabitation takes place after maturity; where consent of either is obtained by force or fraud, and no subsequent cohabitation; impotency, if suit by sound party within two years. In *Kansas*, marriages are prohibited within prohibited degrees; bigamous; when marriage of female was procured by force, menace, or duress; where either party is incapable from want of age or understanding; but cohabitation, after it ceases, cures it. In *Colorado*, a marriage is void within the prohibited degrees; between whites and negroes and mulattoes; bigamous; or when consent of female is procured by force or fraud.

In the *Dakotas*, marriages are void within prohibited degrees; or bigamous, unless absent one, was gone without knowledge for five years, or was generally reputed, and believed, to be dead, in which case void only from date of decree. When parties under age of consent, without parental consent, unless they cohabited thereafter; force, or fraud, unless they cohabited voluntarily thereafter, or impotency.

In *California*, marriages are void within prohibited degrees, between whites and negroes, or mulattoes; bigamous, unless party was absent five years without knowledge, or, be-

lieved to be dead, or, generally reputed to be dead, when decree avoided only from date of decree; under age of legal consent without parental consent, unless they freely cohabited after majority; unsound mind, unless after restoration parties cohabited; impotency; force or fraud, unless they cohabited voluntarily thereafter.

In *Nevada*, if solemnized within the State, a marriage is void for bigamy; within the prohibited degrees where either party incapable for want of age or understanding, unless they cohabit after incapacity was removed; fraud; marriage of female procured by force, menace, or duress; between white and blacks, mulattoes, Indians, or Chinese.

In *Montana*, marriages are void within prohibited degrees; bigamous; when either party is under age of consent; fraud by false personation; when marriage of female is procured by force, threats, menace, or duress.

In *Oregon*, if solemnized in the State, a marriage is void within prohibited degrees; bigamous; between a white and a person of one-fourth, or more, negro, Chinese, or Kanaka blood, or more than half-Indian blood; want of age or understanding, or when consent was obtained by force or fraud; not in two latter cases if voluntary cohabitation subsequently, and annulment only from date of decree.

In *Washington*, marriage is void at suit of innocent party, when either party was incapable of consent from want of age or understanding, or when consent was obtained by force or fraud; within prohibited degrees or bigamous.

In Wyoming, within prohibited degrees, bigamous; where either party was insane, or an idiot, unless they cohabited after restoration to reason, when either party was under age of legal consent, unless they cohabit together subsequently to majority, or when either party was coerced or defrauded, unless they cohabited afterward voluntarily.

In *Arizona*, marriages are void within prohibited decrees; bigamous, fraud by false personation; where female was

married by force, menace, or duress; between whites and Africans, or Mongolians, or their descendants; impotency.

In Idaho, marriages are void within prohibited degrees; between whites and negroes or mulattoes; bigamous, unless when party was absent for five years, unknown, when nullity dates only from date of decree; where marriage was under age of legal consent, and no parental consent, unless parties freely cohabited after majority; insanity, unless parties voluntarily cohabited after restoration; force or fraud, unless parties cohabited voluntarily thereafter; impotency.

In *New Mexico*, marriages are void within prohibited degrees, or when under age of consent.

In *Utah*, a marriage is void within prohibited degrees, or in case of idiocy, or lunacy, or bigamous, or when not solemnized by one with authority; under age of consent, between white or black, or Chinese; where obtained by force, or fraud; within age of legal consent, without parental consent, unless parties subsequently cohabited together after majority.

XLII.

LEGISLATIVE DIVORCES.

Up to a comparatively recent date in England, there was no such thing known as a judicial divorce: i. e., a divorce by a court. But very rarely, Parliament being omnipotent and unrestrained by any exterior authority, was solicited to grant a divorce to some titled profligate, and, if his influence was sufficiently ponderous, it was done, but it was by virtue of political influence, and not of merit or right; it was not a judicial decree upon inquiry and by reason of prescribed law, but a law in which *force* was the judge, jury and sheriff. By virtue of this bad precedent, some of our legislatures undertook to do the same thing, and I think some few of our States still aver their power and right to do so, but it is a custom that has fallen into almost utter desuetude, and no longer exists as a practical measure.[1]

In the Illinois legislature of 1837, a petition appeared for a divorce, the custom having thitherto prevailed to a very limited extent; and, on this occasion, was referred to the committee on petitions, of which Stephen A. Douglas, then in the first year of his public career, was chairman. He made an adverse report on this case, stating, "That it is unconstitutional, and foreign to the duties of legislation, for the legislature to grant bills of divorce," and that ended the practice in that State. Nor is it believed that a legislative divorce would be possible now, or that it would be sustained, even if it should be granted. A possible exception might be

[1] 8 Conn., 541. 2 Md., 429. 54 Pa. St., 255. 51 Me., 480. 1 Met. Ky., 319. 17 Ohio, 445. 1 Gill. & J., 463. 4 Mo., 120. 12 Mo., 498. 17 Mo., 590. 44 Mo., 232.

made of South Carolina, where there is no judicial divorce allowed; still, in a government of prescribed powers, in the absence of such conferred power, I do not see any basis for it. At any rate, its consideration can only be speculative, and, in no sense practical.

In New Hampshire and Massachusetts, the constitutions make special provision as to the mode of obtaining divorces until the legislature shall, by law, make other provision. It has now been done in both States, which makes legislative divorces impossible there. In Georgia, the constitution requires the concurrent verdicts of two juries, at different terms of court, before a decree can be had. In Kansas, all power to grant divorces is vested in the district courts, subject to regulation by law. In Alabama, "no special * * law shall be enacted for the benefit of individuals * * * in cases which are, or can be, provided for by a general law, or where the relief sought can be given by any court in the State. In Delaware, no legislative divorces shall be authorized for any cause cognizable in the courts, nor without one month's newspaper publication. The legislatures of the various Territories are prohibited from granting divorces, and all State legislatures are also prohibited from doing so, except in Alabama, Connecticut, Delaware, Georgia, Kansas, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont.

XLIII.

SEPARATION UNDER A CONTRACT

is authorized under the practice of most of our States, the doctrine being thus stated in Bispham's Eq., Sec., 189: "Family compromises, especially if they are made in good faith and with full disclosure, are favored in equity, and may be sustained by the court, albeit, perhaps, resting upon ground which would not have been satisfactory if the transactions had occurred between strangers;" or, "the power of a husband to make a settlement of property or funds on his wife, by the intervention of a trustee, has never been questioned, and this may be done by a marriage settlement before marriage, or by a deed to a trustee afterward. When the settlement or advancement is thus made, as between the parties, it has always been held binding, and can only be questioned by existing creditors. Such settlements * * have always been favored by the courts." It is usually well, and sometimes essential, to have a trustee. But in some States, as in Missouri and Texas, and in one or two other States, these settlements are not regarded with much favor. Living apart, under a deed of separation, is not technical desertion. In Great Britain, when divorces were not in vogue, deeds of separation were very common, but they are not used much in this country. They might be. It is certainly a much better practice than to apply for a divorce, when there is but feeble reason therefor. [1]

[1] 9 Cal., 479. 9 Colo., 133. 5 Day, 47. 8 Ga., 341. 82 Ill., 67. 1 Blackf., 97. 30 Ind., 452. 25 Ia., 350. 148 Mass., 39. 37 Mich., 563. 94 N. C., 527. 20 Ohio, 518. 105 Pa., 31. 53 Vt., 208. 31 Grat., 52. 1 Mo., 669. 34 Tex., 553. 3 Paige, 500. 4 Dana, 140. 3 Metc., 507. 41 Barb., 93. 10 Ohio S., 247. 16 Ohio S., 531. 4 Bush., 453. 35 Pa. St., 361.

I annex a form of such agreement, which the Pennsylvania Supreme court upheld.

Articles of agreement made, concluded, and agreed upon, by and between Richard Rutter, of Leacock township, in the county of Lancaster, of the first part, and Julia Rutter, wife of said Richard, of the same place, and her son David Brisben, of Salisbury township, in said county, of the second part, witness that, whereas, differences lately happened between the said Richard Rutter and Julia, his wife, which caused the said Julia to leave her said husband; and whereas, the said Richard Rutter and Julia are desirous that all differences heretofore existing between them shall be settled and compromised, and that they will again live together in union and harmony as becomes man and wife; and in consideration thereof, and for the purpose of avoiding future differences and dissensions, they have mutually agreed, and by these presents do agree, that their respective properties and estates shall be held and enjoyed as follows, to-wit: The said Richard Rutter hereby covenants and agrees to and with his wife Julia and her son David Brisben, that in case the said Julia shall die before the said Richard, that then and in such case, upon the decease of the said Richard Rutter, the administrator or assigns of the said Richard shall pay over, grant, and convey the one-half of all his estate, real and personal, unto the said David Brisben, only child of the said Julia by a former husband, if he be then living, and in case he be not then living, to his child or children, if any then living, and to the issue of any then dead, *per stirpes*, their heirs and assigns in equal shares and parts; and in default of any child, or issue of any deceased child, then to the next of kin of the said Julia, their heirs and assigns, according to the intestate laws. And the said Julia Rutter, by the advice and approbation of her son, David Brisben, hereby covenants and agrees that the said Richard, her husband, shall receive and take for his own use the annual interest or the principal sum of three thousand dollars, which is charged on, and payable out of, the real estate of her late husband, Henry Brisben, deceased, during life as the said Richard has heretofore received the same, so long as the said Richard and Julia shall live together. And the said parties do hereby mutually covenant and agree that in case any future separation of said Richard and Julia shall take place, either by his leaving her

or by she leaving him, that then, and upon such separation, the said Richard shall pay to said Julia the sum of five hundred dollars, and thereafter suffer and permit the said Julia to take and receive annually the interest of the said sum of three thousand dollars, payable out of the estate of the said Henry Brisben, deceased, as aforesaid, which shall be in full of her dower right of and in his estate. And in case the said Julia shall survive her husband, the said Richard, and they shall, at the decease of the said Richard, be living together, then the estate of the said Richard shall pass and be distributed agreeably to the intestate laws.

In witness whereof, the said parties to these presents have hereunto set their hands and seals, this sixth day of August, A. D. 1849.

RICHARD RUTTER. [SEAL]
JULIA RUTTER. [SEAL]
DAVID BRISBEN. [SEAL]

XLIV.

BREACH OF PROMISE OF MARRIAGE.

If a man and woman agree together to marry, and a date is fixed, such date constitutes part of the contract, and the consummation must be had then, unless a reasonable cause is shown to extend it, but courts will not be astute to hold a party to a literal performance of his contract, as to the time. If, however, no time is named, it will be presumed to be within a reasonable time. The action will lie at suit of either party, although, usually, the female is plaintiff. A suit will not lie against an infant; i. e., a male under twenty-one, or a female under eighteen in some States, and twenty-one in others; but if an adult is liable on the breach of promise to an infant, the latter may maintain suit by guardian or next friend. If a defendant in such suit is *impotent*, such impotency is a bar, however, to substantial damage, as it is a case of *damnum absque injuria*;[1] nominal damages to cover costs only would be allowed. There can be no damage for failure to marry one who is impotent, but if the defendant is married before the contract without the knowledge of the plaintiff, or marries after the making of the contract, then the action will lie. There is no rule to be laid down for gauging the damages which will be authorized; it will depend upon the age, beauty, and position in life of the parties, their appearance, the degree of moral turpitude inherent, etc. A handsome female might expect more than a plain one, a young one more than an old one, a woman than a man; in fact, the circumstances should be very exceptional, which would authorize a male to sue at all.

[1] Gulick, 12. Vroom, 13.

And I was once consulted by an aged and atrociously plain female about the propriety of her suing one of the wealthiest brewers of Chicago for trifling with her

"* * Maiden meditations, fancy free!"

and I assured her she could not hope for enough results to pay my fee.

The mistreatment of the female by the male, as seduction, slander, unmanly treatment of any sort, will be admissable in aggravation to enhance the measure of damage. Any circumstance disclosed subsequently to the promise, tending to lessen the defendant's value as an eligible *match*, is authorized, in diminution of damages. If it should be made patent that the female plaintiff was pregnant before the promise, and that such fact was unknown to the defendant, it would preclude any recovery whatever. Evidence is usually circumstantial, as marked attention, the giving of presents, perodical visits and long sessions together, the demeanor toward each other, but not infrequently there is correspondence which is conclusive, or in some cases direct admissions, which are equally so. If the defendant offers to carry out the agreement after suit is brought, it will not be a bar of the suit, but may be offered in mitigation of damages.

If a party fails to carry out his agreement at or about the time agreed on, or within a reasonable time, and the injured party gives ample warning, in vain, and then brings suit, an expressed willingness to then carry out the contract will not bar recovery, although it may be left to the jury to say if or not the suit was premature, or sufficient opportunity had or had not been given, or in mitigation of damages.

XLV.

THE ETHICS OF DIVORCE.

It may as well be conceded in advance that in all countries, in all ages and among all people, sexual intercourse is a social *institution*, which does, and will continue to exist, in the most sober and most frivolous society alike, will be regulated by the law of demand and supply, whose exercise is essential to a normal condition of life and being, and which may be morally healthful or baneful, accordingly as its use and application is proper, or not. The practical socialists commenced at Hull, England, with the total abnegation of the sexual instinct, and ended at Oneida county, New York, with practices of the most abominable lechery: and the Rev. John Humphrey Noyes, who commenced life as one of the most chaste and self-denying ascetics, in his maturity practiced the most odious and detestable libidinousness, and justified it by a *melange* of biblical lore and obscenity, thus attesting that a moral pendulum which abjures the law of gravitation, and swings in the reach of super-excellence, will also, on the rebound, attain the antipodes of its aspired-to perfection. No class of men were ever so extreme in licentiousness as the popes of the middle ages, consecrated to celibacy; no rake is so utterly void of a moral sense as one who was an anchorite in his youthful prime. By multiplying and intensifying crimes, moral and other, we multiply and intensify criminals; by making an outlaw of divorce, we accelerate its rapid career, and increase the worshippers at its shrine. As bad as divorce is, it would be much worse if there was either none, or, it was seriously restricted; there would be untold and utterable

marital misery and floods of licentiousness, where now are comparative rills. The flagitiousness of South Carolina politics is an index of its morals; in point of fact, it was the home alike of the duellist, the slave propagandist and the nullifier, its political immorality was the entering wedge of our great rebellion; its masses, white and black, were and are mudsills, while a mere few of the patricians revel in luxury and deportment. It is an abnormal and unwholesome society, *sui generis* as to discomfort of politics and morals. And it is the only State which is hermetically sealed up against divorce. Of course, the lack of divorce has nothing to do with its severe caste and bankruptcy of political ethics; but its lack of political and social progress are alike exemplified in its retention of men and women in the matrimonial dungeon of a century since, and in its inauguration of a government of the enlightened nineteenth century on the corner-stone of human slavery. In the callow States of the frontier, the divorce law and practice is lax and reprehensible. Its population consists of immigrants, some of whom, fleeing from marital slavery, desire a speedy release, and are enabled to impress their wishes on the statute books. But not only do their own citizens obtain divorces, but citizens of other States also go through the forms thereof in fraud of the laws of their domicil, and thus lay the foundation for serious evils and complications in the near future. If all States would make it a felony for its citizens to go to another State in order to procure a divorce, it would be salutary. They do punish bigamy and adultery, committed on the foundation of a spurious divorce, but they fail to reach many cases. It is only when some irate husband, wife or friend chooses to put the law in motion, that punishment ensues.

The prohibition, paucity, or plethora of divorces in a community, affords no gauge of its public or private morality. No legislature in the whole Union has been so flagitious as that of New York, where, for years, Boss Tweed, the Albany

regency, and Tammany, held autocratic sway; and of whose favors Jay Gould and the "Erie" gang were regular customers; yet, it has always been austere in its social morals; in point of fact, it has the most puritanical divorce law of any State, which has any. It will not be alleged that the Dakotas are immoral States, yet divorce pilgrims wend their ways thither in solemn procession, from all parts of the Union. No responsible power has ever taken this important subject under serious consideration; no State constitution has ever considered it in the sense of limitation or regulation, but each State has adopted a policy of its own, frequently widely different from other State policies similarly situated, and to these policies, whether ill or salutary, they have tenaciously adhered, until, in some flagitious cases, they have been driven away at the demand of decency. No test of morality is made by the "divorce" institution. In South Carolina, they have none; in Massachusetts, many; in the palmy days of "Utah" divorces, its patrons were exclusively Gentiles from the Aroostook to the Rio del Norte, and no Mormon's name stained its polluted pages. I repeat what I have said elsewhere: there is no immorality or even inexpediency in an honest divorce; and the efforts of society, to do any good, should not be directed against divorce, as an institution, but against spurious and fraudulent divorces, and also against the fundamental causes for divorce.

In its best and normal estate, the marital condition requires that the parties shall, as a rule, live together, and not apart. Such was the case in the no-divorce days. Such is not the case now. When ninety per cent. of our people lived on independent farms, the causes for divorce were reduced to a minimum. When at least twenty per cent. of our married men scarcely know their families, being usually absent from them, causes for divorce are inevitable from that cause, and, in the structure and practice of society otherwise, lie many other causes. In looking over the dramatic papers, I find that Shakespeare, Otway and the playwrights of the chaste

drama are entirely banished, while the "society" dramas, written by Ouida, Zola, Dumas and other apostles of nastiness, are regnant, and in order to spice and interlard the volumes of stage wretchedness, caused by adultery and such like, the bewitching, "naughty, but nice," *leg* shows are plentifully strewn between. Nothing attests the spirit of the age and decadence of morals to better advantage. It holds the mirror up to nature in this, as well as other, phases. *Facilis descensus averni*, in this, as in other things: and even of a more depraved taste, is the exhibition of the professional beauty, and the prize fighter of the latter-day drama. When one of the former gets sufficiently soiled, she either goes to England and receives the *imprimatur* of the Prince of Wales, or some other titled noodle; else gets knocked out by her husband in a nasty divorce court, and is then ready for business. "How do you like the Prince of Wales?" was asked of a debutante, for publication: "Oh! ever so much," was the ingenious reply. "He's *so* JOLLY." That was enough; thenceforth her fortune was assured, for every one wanted to see a female who could affirm that the prince was *jolly*, that term not meaning what it once did; and whether a prize-fighter *licks* or gets *licked*, he is sure of a crowded house.

What will be the round-up of this eclipse of decency cannot be affirmed, but it can be affirmed, that it is the hot-bed to produce divorce crops, and that the latter is not the cause, but the effect, of the pruriency and license of the age.

In any table of divorce statistics that one may scan, it will appear that the causes for divorce, alleged by females, are cruelty, drunkenness and desertion, while the cause avouched by males is adultery. Men commit adultery frequently enough, but will not tolerate a single lapse in their wives. They probably should not, but they should be without the same sin themselves. One of the most consummate lechers of Central Illinois, returned from the war to find that his wife had gone wrong in his absence. He promptly got a divorce and the custody of their two little boys, whom he

proposed to at once remove to the far West, but as a favor to a broken-hearted mother, the husband allowed them to spend the last night with her who had undergone travail for, and given them, life. He occupied the adjacent room. He narrated the circumstances to me. He said that the agonized mother held these children on her lap, or kneeled down with them and supplicated God to not separate them, then became frantic, hysterical, wild, tore her hair, shrieked, fondled her precious children to her bosom over and over again, and in the morning was torn away from them by muscular force. And what dread crime deserved so severe a punishment? The unpardonable marital sin—the same he admitted to me he had committed hundreds of times. But *she* had eaten of the forbidden fruit, and must therefore die.

A woman, however, cannot endure cruelty and desertion. She is entitled to protection and companionship, and when these are wrested from her, she ought to have redress. Necessity demands it. Morality demands it. The divorce law is not accountable for a strong brute beating a frail woman whom he has sworn to cherish and protect, nor yet is it responsible for one who, having undertaken to care for her, has left her to perish or suffer: and a law which furnishes her even an imperfect relief, is a needed and beneficial law.

I have been brought face to face with cases where a wife found a more desirable and apt affinity, and desired to put off the old love in order that she might put on the new. That certainly, if there is no other cause, it would appear, should be reprobated and discouraged. I think it ought, certainly, but in the cases I have known, I know of a verity that, unless a separation was had for an insufficient cause, an emphatic cause, viz.: adultery, would soon exist, for a woman in love will not usually be balked of her desire by the inefficient ukase of a divorce law. While not now advocating anything, I state as facts, within my own personal knowledge, that several of the happiest marriages I have known, have been between parties wrongly paired and

mated in the first instance, but truly mated after a divorce had secured them their liberty. Would not Felicia Hemans have been happier divorced, than as she was?

The pathetic life romance of Abby Sage, who first married an entirely unsuitable man, and afterward found Albert D. Richardson, who had the same pursuits, tastes, style, and ambition, will occur at once. There was nothing in common between her and McFarland, except the conventional tie, which authorized him to indulge in the pleasant pastime of abusing her; there was everything in common between her and Richardson, and, although he died in one day after their marriage, she abjured all marital projects thenceforward, and revered her true husband's memory as her sole duty and wish thenceforward, through life.

A girl of sixteen may chance to select her proper affinity, but it may also occur, that she may make the most unwise choice; of course she must be held to it, if exterior propriety and sanctity holds sway, but if this unfortunate selection gets drunk, is cruel, deserts her, or does anything equally flagitious, it would seem that Providence has opened the net for the escape of this imprisoned child from the snare of the fowler. Divorce frequently wears the garb of the infernal pit, but it is also frequently attired in the white robes of an angel of succor and deliverance.

There are instances of "jolly" wives, who shamelessly, and with scarcely a gossamer veil of secrecy, consort with some paramour, and there are plenty of shameless men who are parties to one notorious *liason* after another. For these moral derelictions, surely the divorce law is not responsible; and the severest casuist, who holds to the morality taught by our Saviour, could make no valid objection to a law which would allow a decent person to cut loose from so unsavory a partner.

I can, myself, easily recall the time when the individuality of the wife was ignored and submerged: both husband and wife being one, and the husband posing individually as the

one. In those halcyon days, there was written on the door of many and many a home, but visible only to the wife, the doom, "All hope abandon, ye who enter here." If the husband chose to be kind, it was well; if he preferred to be brutal, it was ill, and, although there might have been laws of divorce on the statute books, they were rarely enforced. Society was in better form and more solemn than it is now, but the joys and rights of women were comprised within the sentiments of this verse:

The rights of woman! What are they?
The right to labor, love and pray,
The right to weep with those who weep,
The right to wake when others sleep.

The right to dry the falling tear,
The right to quell the rising fear,
The right to smooth the brow of care
And whisper comfort in despair.

The right to watch the parting breath,
To soothe and cheer the bed of death;
The right, when earthly hopes all fail,
To point to that within the vail.

The right the wanderer to reclaim,
And win the lost from paths of shame.
The right to comfort and to bless
The widow and the fatherless.

The right the little ones to guide
In simple faith to Him who died.
With surest love and gentle praise,
To bless and cheer their youthful days.

The right the intellect to train,
And guide the soul to noble aim.
Teach it to rise above earth's joys,
And wing its flight for heavenly joys.

The right to live for those we love,
The right to die that love to prove;
The right to brighten earthly homes
With pleasant smiles and gentle tones.

Are these thy rights? Then use them well.
Thy silent influence none can tell.
If these are thine, why ask for more?
Thou hast enough to answer for.

Are these thy rights? Then murmur no.
That woman's mission is thy lot.
Improve the talents God has given.
Life's duty done, thy rest is Heaven.

In other words: the only right a woman has, is to be a household drudge on earth: with a prospect of reward therefor, hereafter.

John A. St. John thus attests his opinion: "In all wise systems of legislation, there should exist a reasonable facility for divorce, as much at least for the woman's sake as for the man's. But while the law favored divorce, education should be inimical to it. All the tendencies of society should be to give stability to the unions of affection. All the laws of the state should favor the dissolution of union founded on anything else. Wherever marriage is indissoluble, society is compelled to tolerate great corruption of manners, for which reason all Roman Catholic countries exhibit less respect for the marriage vow than do Protestant countries. Without perceiving it, they who teach that marriage is indissoluble, only repeat the primitive law, that the two sexes were made indiscriminately for each other. * * To render marriage an union of love, you must enable it to cease with the feeling on which it is based. An union of hatred is disagreeable to civil society, which thus flies in the face of nature by yoking together what God intended should exist apart. * * God is love, and joins only by the link of affection. We are guilty of impiety when we attribute to him those connections which exist in base interest, in calculations of conscience, or any consideration whatever but simple and pure affection." And Westbrook, who gave much thought to, and wrote a treatise on, the subject, says: "To chain two human beings fast to each other's side against the perpetual protest of galled and

wounded human nature, is an offence at which angels weep. The great indifferent public have no right to say either on the basis of any statute law, or on the deeper basis of any popular sentiment, or on the still deeper basis of any supposed religious tenet, that any two individuals, man and woman, shall live together as husband and wife against the inward protest of their own individual souls, derived from whatever source; based on whatever foundation, sanctioned by whatever tradition, such a legalized tyranny is unworthy of a Christian civilization, shamefully perverts the fundamental teachings of Christianity, and destroys the sacred claim of religion to the reverence of mankind." Again he says: "Divorce *a mensa et thoro* is a device of the medieval clergy of the Roman Catholic church—a stratagem of the Canon law to retain men subject to its authority is most unnecessary and is characterized by cruelty and wrong, and is known to be productive of evil too monstrous to be mentioned. To compel a virtuous woman to seek such a separation, with so many evils and embarrassments, or to remain in the custody of an abusive, drunken brute, sharing his disgusting couch as the bloated wretch returns from his nightly debauch to threaten and *outrage* her—a torture surpassing the scourging of the lash—is a form of cruelty that cannot be contemplated with calmness. A state that offers no permanent relief by law for a refined and virtuous woman thus suffering, and will not even acknowledge the validity of a divorce she may have been compelled to seek in another jurisdiction because she could not lawfully get it in her own home, is not worthy to be called a free commonwealth.

The wife of the author of "Paradise Lost" deserted him while he was yet comparatively a young man, and he was obliged to live single the rest of his days. No wonder he was an advocate of divorce, even in a country which did not allow it except by act of Parliament. From a lengthy monograph written by him on that subject, I make the following extracts: "What thing more instituted to the solace and de-

light of man than marriage? * * * And yet the misinterpreting of some scripture * * * hath changed the blessings of matrimony into a familiar and cohabiting mischief, at least into a drooping and disconsolate household captivity, without refuge or redemption. * * * Now if any two be handed into the church, and have tasted in any sort the nuptial bed, let them find themselves never so mistaken in their dispositions, through any error, concealment, or misadventure, that through their different tempers, thoughts and constitutions, they can neither be to one another, a remedy against loneliness, nor live in any union or contentment all their days: yet, they shall be made spite of antipathy to fadge together. * * What a calamity is this!" Again he says: "What a violent and cruel thing it is to force the continuing together of those whom God and nature in the gentlest end of marriage never joined. * * Marriage is a covenant, the very being whereof consists not in forced cohabitations and counterfeit performance of duties, but in unfeigned love and peace. Love in marriage cannot live nor submit, unless it be mutual, and when love cannot be, there can be left of wedlock nothing but the empty husks of an unholy matrimony, as undelightful and unpleasing to God as any other kind of hypocrisy. * *

Bentham says: "A condition requiring the continuation of marriage notwithstanding a change in the feelings of the parties is absurd, shocking and contrary to humanity." Alex. Von Humboldt says: "Marriage having this peculiarity, that the objects are frustrated when the feelings of both parties are not in harmony with it, should require nothing but the declared will of either party to dissolve it." From Miss Charlotte Bronte, we have this: "When the wife's nature loathes that of the man she is wedded to, marriage must be slavery: against slavery, all right thinkers revolt, and tho' torture be the price of resistance, torture must be dared: tho' the only road to freedom be thro' the gates of death, those gates must be passed, for freedom is indispensable."

[THE END.]

INDEX.

A.

Absence, Doctrine of....108
Actors, About Domicil of....245
Adultery, Definition of....114
As Ground for Divorce....115
As to Proof....117
In England, Custom to Ask *Opinion* of Witness as to: not so in America....280
Where Divorce granted for Wife's-Husband will have Children....314
Ages of Legal Consent in Various States....54
Agreement to Marry, is not Marriage....51
Alabama, Statutory Provisions Concerning Divorce....93
Alimony is an Ordinary Incident of a Divorce Suit....282
Different Kinds of....302
Incident to a Divorce....303
Circumstances taken into account in Determining....303
Amount usual to allow....304
Court always Open to Hear Motions Concerning....305
May be Increased or Diminished....305
No Settled Rule as to Amount of....306
Conflict of Authority as to Whether Remarriage Stops....306
As a Rule, Courts cannot Allow Gross Sum for....306
No Extra-Territorial Force to *ex parte* Decree for....306–307
No, except, *pendente lite*, allowed for Void Marriage....306
Continued when Appeal Taken....306
None Allowed, if Living with Paramour....306
Small Allowance During Pendency of Suit....307
Allowance of One-fifth of Joint Income Sometimes....307
In Some States, Husband may have Alimony....308
Sometimes Allowed in Ordinary Chancery Jurisdiction....308
Answer in a Divorce Suit....276
Form of, in a Divorce Suit....295
Arizona, No Ceremony of Marriage Necessary in....37
Statutory Provisions Concerning Divorce....99
Arkansas Declares Marriage a Civil Contract Merely....53
Statutory Provisions Concerning Divorce....95

Athenians, Divorce Law and Practice Among 77
Austria, Marriage and Divorce Laws of 197

B.

Bacon, Description of Marriage 36
Baden, Divorce Laws of 201
Bastards, South Carolina Approves Law to Support 8
Tendency of Law to Legitimize 315
Belgium, Divorce Laws of 197
Bentham, Jeremy, on Divorce 358
Bigamy, Conviction for, in New York, although Party Legally Divorced in Ohio 219
May be Committed, despite Dakota Divorce 257
Harmless, if Unpunished 257
Parties Saved from Punishment by Mutual Guilt of Parties or Lenity of Innocent One 257
How to Escape Technical, after Fraudulent Marriage 268
Instances of Technical, in Different States 271
Bills in Divorce, Forms of 288–293
Blackstone, Concerning Law of Marriage 36
British Columbia, Divorce Law of 206

C.

California, Statutory Provisions Concerning Divorce 100
Canada, Divorce Laws of 195
Caswell v. Caswell. 120 Ill., 377, Statement Concerning 286
Catholic Church, Abhors Divorce 7
Holds Marriage to be a Sacrament 40
Regulations as to Marriage 59
Disallows of Divorce 77
Cecrops, King of Athens, First Denominated Marriage to be Civil Contract 33
Ceremony, Form of 66
Chicago, as a Divorce Jurisdiction 83
Early, as a Place for Flagitious Divorces 255-6
Especial Practice of Divorce in 284
Children Among the Romans 24
Under Seven, Incompetent to Marry 42
Of Divorced Parents, cannot Interfere in Suit 232
Custody of 283
About Legitimacy of, in Nullity Suits 309
" " " Divorce " ..... 309 et sup.
Of Divorced Parties do not Lose Rights as Heirs 315
Tendency of Law is to Legitimize 315
Mode of Asserting Heirship 315
Chinese and Whites, Marriage between 141

Chloral Habit, not Cause for Divorce.....131
Church Authorities Divided as to Subject of Divorce..... 76
Catholic, Disallows of Divorce..... 77
Client, should Deal Frankly and Disingenuously with Counsel.....279
Code Napoleon, Allows Divorce..... 77
Collusion between Parties Bars Divorce.....146
General Doctrine of.....146
Notable Instance of, in Danforth Case.....259
Colorado, Marriage Defined as a Civil Contract in..... 53
Statutory Causes for Divorce..... 98
Divorce, Result of.....260
Common Law Marriage in Me., Md., Mass., N. C., Tenn., Conn., Del. and Ky..... 37
Common Law Marriage (Concerning)..... 38
Rude Contracts of.....38–9
Instances of..... 41
Danger of being Entrapped in.....259
Condition, Original, on Rescission of Divorce Contract, Parties cannot be Restored to their.....318
Condonation, General Doctrine of.....148 et sup.
Congress, Law of, as to Authentication of Records.....219
Connecticut, Common Law Marriage not Good in..... 37
Statutory Provisions Concerning Divorce..... 88
Connivance, General Doctrine of.....150
Consanguinity, List of Persons Included in.....55 et sup.
Consent, Age of Legal, 14 in Male. 12 in Female..... 42
Mutual, Necessary to Valid Marriage.....226
Constitutional Provisions about Judgments of Other States.....219
Construction of Act as to Bigamy.....269
Contract of Marriage, Breach of Promise of.....347
Conviction of Crime, as Cause for Divorce.....142
Co-respondents Joined in England and Some States.....277
Costs, Co-respondents Sometimes Forced to Pay.....277
Courts, not Bound by Averment of Jurisdiction of Another Court...215
Every Person Entitled to his Day in, before he can be Bound,263
Court, Practice and Precedents.....272
Terms of, in Chicago.....285
Rule of, in Contested Case.....287
Of the, in Divorce Suits.....299
Various Names of, for Divorce Suits.....299
Crime of Bigamy, how Averted after Fraudulent Divorce.....215
Cross Bill, should be Filed, Simultaneously with Answer.....280
May be Filed by Defendant.....282
Cruelty, as Cause for Divorce.....118
Curtesy, Husband's Right as Tenant by, Ends with Divorce.....316
Custody of Children in Divorce Suit.....277

D.

Dakotas, Statutory Provisions Concerning Divorces in..... 98
As *locus in quo* for Fraudulent Divorces.....257
Dakota Divorce, Results of.....259
How to Plead to the Jurisdiction.....263
May be Fraudulent even when Both Parties Appear.264
Danger of Prosecution for Bigamy, Relying on Fraudulent Divorce.257
Being Entrapped into a Common Law Marriage.....259
Which Bigamists are under.....259
Davis, David, Judge. Sensible Views Concerning Divorce..... 80
Decree of Divorce, Void if Court had no Jurisdiction over Parties...215
Decree in One State, Effect of, in Another.....216
Decree of Divorce on Substituted Service, Effect in Another State..
.....216 et sup.
Decree, Fraudulent, Concerning..... 231
Effect of Foreign..... 266
In a Divorce Suit..... 283
Form of, in Divorce Suit..... 291
Obtained by Fraud is Void, and Changes no Status..... 316
Fraudulent, cannot be known till Adjudication..... 316
Don't Gather Strength by Efflux of Time..... 317
Defamation, Public, as Cause for Divorce..... 143
Defence, Sham, Considered..... 260
Defences in Divorce Proceedings.....144
Delay in Bringing Divorce Suit.....154
Delaware, Common Law Marriage not Good in..... 37
Statutory Provisions Concerning Divorce..... 90
Delicacy should be Observed in Divorce Proceedings.....279
Denmark, Divorce Laws of.....201
Depositions may be taken in Divorce Proceeding.....282
Derivative or Unwritten Law.....288
Deserted, When Husband has, Wife may Acquire Separate Domicil..230
Desertion, as Ground for Divorce.....129
Requisites to.....129
Differences between "Utah" and "Dakota" Decrees.....258
Dist. of Columbia, Statutory Provisions about Divorce..... 90
Divorce should have Candid and Dignified Discussion..... 7
Is firmly Entrenched in Society..... 7
Is acted on by Lawmakers and Courts..... 7
Catholic Church Abhors it..... 7
South Carolina will not Tolerate it..... 8
Changed Circumstances beget Cause for..... 10
Summary of Causes for Increase of Divorce..... 15
Preliminary Remarks Concerning..... 71
Classification of Subjects under..... 72

Divorce, Jewish Practice Concerning.... 72
Practice in Rome Concerning.....72 et sup.
None in England except for Adultery prior to 1858..... 75
None in Scotland except for Adultery prior to 1861..... 75
Great Increase within few Past Decades..... 75
Reform should be of *Cause* for Divorce, and not Effect..... 75
Under Turkish Administration, three Kinds..... 75
Pagans, Mohammedans, Jews and Greeks, one Kind..... 75
Under Mosaic Dispensation, Method of.... 75
Egyptian Laws Concerning..... 76
Athenian Laws Concerning..... 77
Romans, Divorce Laws Among..... 77
Catholic Church, Disallows..... 77
Greek Church, Allows..... 77
Protestant Church, Allows..... 77
Code Napoleon, Allows..... 77
German Empire Allows but Two Causes..... 77
Law of England Concerning..... 77
Morality of.....78 et sup.
Expediency of.....78 et sup.
Davis, David, Hon. Sensible Views Concerning..... 80
Phelps, Edward J., Hon. Impracticable Views of..... 82
Chicago as a "Divorce" Jurisdiction..... 83
A Moral Necessity..... 84
"Void" and "Null" Marriages.... 84
A vinculo matrimonii, Definition and Consequences..... 86
A mensa et thoro, Definition and Consequences..... 86
Statutory Provisions Concerning.....86 et sup.
Summary of Statutory Causes for.....101 et sup.
Classification of Statutory Causes for..... .....104 et sup.
Limited, Summary of Causes for.....106 et sup.
Doctrine of Absence connected with.....108 et sup.
Adultery as Ground for.....114
Impotence as Ground for.....125
Desertion as Ground for.....129
Drunkenness, Habitual, as Ground for.....131
Drunkard, Definition of a Legal.....132
Fraud, as Ground for.....132
Force, " 132
Error, " 132
Mistake, " 132
Duress, " 132
Concealment of Prior Unchaste Character of Wife, no Ground to Annul Marriage..... 134
Pregnancy before Marriage. Cause for Divorce in some States.....134

Divorce, Gross Neglect of Duty Cause of Divorce in some States...135
Insanity as Ground for Annulling Marriage.....137
Idiocy " " " 137
Sodomy as Ground for Divorce.....138
Intolerable Treatment or Offering Indignities as Ground for Divorce.....139
Failure to Support, as Ground for Divorce.....140
Miscegenation, as Ground for Divorce.....140
Joining of Religious Sect which denies Obligation of Marriage, Cause for.....142
Conviction for Crime, Cause for.....142
Imprisonment for Crime, Cause for.....142
Incompatibility of Temper, Cause for.....142
Public Defamation of Wife, Cause for.....143
Defences in.....144
Collusion in.....146
Condonation in.....148
Connivance in.....150
Recrimination in.....152
Limitation in.....154
Laches in.....154
Delay in.....154
Insincerity in.....154
Statutory Limitations in bringing Suit.....155
Foreign, The Doctrine of Foreign Divorce.....157
Law of England.....195
Canada.....195
Scotland.....196
Ireland.....196
France.....196
Belgium.....197
Austria.....197
Hungary.....198
Switzerland.....199
Sweden.....200
Denmark.....201
German Empire.....201
Baden.....201
Elsass Lothringen.....202
Saxony.....202
Wurtemberg.....202
Prussia.....203
Hamburg.....204
Netherlands.....204
Roumania.....204
Russia.....204

Divorce Law of Poland....204
Finland....205
Italy....205
Nova Scotia....205
New Brunswick....205
Prince Edward's Island....205
British Columbia....206
Utah Law and Practice....207
Jurisdiction in....209
Law of Place of Actual Domicil, Governs....213
Lex Domicilii Controls *Status* of Person....214
Valid, can only be had in place of Domicil....215
Effect of Decree Procured in One State, in Another. 216 et sup.
Procured upon Substituted Service, Effect of....217
Same Subject Discussed....222 et sup.
Essentials to Render a Decree of, Void....228
Invalid, when Obtained beyond Parties' Own Domicil....229
Elaborate Rules as to Jurisdiction and Practice in....230
If Either Party go to Another State to get, Void in State of Domicil....248
Void in Delaware, Massachusetts and Maine when Citizens Resort to Another State to Procure....236
Residence Required for Purpose of Obtaining....237
Responsible Advice Needed in and about....253
Modern Divorce Methods have been in Vogue now for Forty Years....254
About Spurious....255
Indiana....255
Chicago....255
Utah....255
Dakota....256
Of Non-Residents will not Stand Test when Tested....256
Colorado Divorce. Results of a....260
Dakota Divorce, Results of a....260
Valid where obtained, not necessarily Valid Elsewhere....262
Void where Rendered, Void Everywhere....262
Decree Unavailing, unless Rightful and Proper....264
Necessity of Overruling Fraudulent Decree of....267
Mode of Service in Divorce Suit....275
Copy of Notice in English Divorce Suit....274
First Steps in Divorce Suit....275
Hearing in Suit for....282
Decree Void, if Court had no Jurisdiction over Parties....284
Will not be Granted on Uncorroborated Testimony of Parties....284

Divorce Court has Power to Vacate Decree of, for Fraud or Imposition....284
Especial Practice in, in Chicago....284
Publication in, in Chicago....284
Chicago Rule of Court in....285
Forms of Bills, Orders, Answers and Decrees in....288 et sup.
Alimony, an Incident to....303
Amount of Alimony on Decree of Divorce....304
Suit Money or Costs Allowed in....308
Ethics of....349 et sup.
Difference in Application for, of Men and Women....353
Legitimacy of Children in Suits for....309 et sup.
Children of Divorced Parents Remain Heirs at Law....315
Legislative....342
Domicil, Law of Place of Actual, Governs in Divorce....213
Definition of....213–214
Question of, Discussed....225
Husband may Choose....230
Wife may Acquire Separate, when she is Deserted....230
Law of Persons Governs as to Contractual Ability to Marry244
Law of, further, Elucidated....244
Of Actors, Traveling Men, Etc....245
Requires Time to Acquire....245
Of Married Women that of Husband, with Exceptions....245
Of Husband and Wife of Equal Force and Dignity....248
Definition of....254
Divorce in, Valid there, Valid Everywhere....254
In Place Other Than, Invalid Everywhere....254
Person Resorting to Place not his Domicil for Divorce, not Valid....254
Persons who do all Business at their Domicil, also leave Domicil Frequently for Divorce—Solecism....254
If *bona fide* when Suit Commenced, Need not be Kept up.280
Domitian, Correlative Right of Divorce of Husband and Wife under Law of....76
Dower, Wife could not be Deprived of, by Fraudulent Divorce....265
Wife has no, in Divorced Husband's Estate....316
Rights, Wife Forfeits on Divorce, for her Misconduct....320
Subject of, Generally....322
Divorce Bars, unless Saved by *lex rei sitæ*....322
In Divorce Cases, in only of Property held During Coverture....323
If Both Parties Guilty of Misconduct, no Dower....325
Statutes have Largely Changed Common Law, as to Dower.326
Demurrer to Bill for Divorce....276
Drunkenness, Habitual, as Ground for Divorce....131

Duress as Ground to Annul Marriage..... 132
Duty of State in Regard to Fraudulent Divorce.....267

E.

Egypt, Divorce Laws of..... 76
Elsass Lothringen, Divorce Laws of.....202
England Holds Religious Ceremony Necessary to Constitute Marriage..... 40
No Divorce except for Adultery Prior to Divorce Act of 1858 75
Practice Concerning Divorce..... 77
English Divorce Law, not in our Jurisprudence.....288
Error as Ground to Annul Marriage.....132
Essenes, Object of Marriage of..... 67
Ethics of Divorce.....349 et sup.
Practice.....273
Europe, Divorce Laws of.....195
Ex parte, Divorce Suits, Practice in.....282

F.

Failure to Support Wife as Cause for Divorce.....140
Father's Right to Possession of Child, Paramount.....314
Fees, Legal, for Marrying..... 67
In Divorce Suits in Chicago.....284
Finland, Causes for Divorce in.....205
Flagitiousness of New York Legislature.....350
Florida Courts on Marriage (Mere Contract)..... 36
Statutory Provisions Concerning Divorce..... 92
Force, as Ground to Annul Marriage.....132
Forms of Bills, Answers, Motions and Decrees in Divorce.....288
France, Marriage and Divorce Laws of.....196
Fraud, as Ground to Annul Marriage.....132
Impeaching a Decree for (instances).....218
Vitiates Everything, but no one can Complain unless he be Injured.....234
Distinction between Decree Obtained by, and Lack of Jurisdiction in a Tribunal.....234
When Both Parties Participate in, Neither can be heard to Attack it in any Way.....235
Stranger to Judgment may Show it was Obtained by.....235
Effect of, upon Judgment.....236
Decree of Divorce set Aside on Account of.....286
Fraudulent Decree will not be Scrutinized on Application of any Outside Party.....234
Fraudulent Divorce, Mischief and Hazard of.....253
Decree, Reason for Immunity in.....263
Easily Set Aside.....265
Fun, Marriage in, Invalid..... 51

G.

Gaines, Mrs., Marriage of Parents of..... 42
Georgia, Statutory Provisions Concerning Divorce in..... 92
German Empire, Allow Two Causes for Divorce..... 77
Law of Marriage of.....201
Gentile Population in Utah weeded out Fraudulent Divorces.....256
Greek Church Allows Divorce..... 77
Greeks, but One Cause of Divorce Among..... 75
Gross Neglect of Duty, Cause for Divorce in Some States..... 135
Guilty Persons in Divorce Matters are not Proceeded Against.... ..268

H.

Hamburgh, Divorce Laws of.....204
Hearing, in a Divorce Suit.....282
Herod, Equality Between Man and Woman under Laws of, as shown by Correlative Rights of Each to Divorce..... 75
Home of Actors, Traveling Men, Etc.....245
Humboldt, von Alex. on Divorce.....358
Hungary, Marriage and Divorce Laws of.....198
Husband. Divorce not Allowed on Uncorroborated Evidence of.....284

I.

Idaho, Statutory Provisions Concerning Divorce in.....100
Idiocy as Ground for Divorce.....137
Illinois, Courts on Common Law Marriage..... 37
Statutory Provisions Concerning Divorce..... 97
Opening Decree of Divorce Obtained on Publication.....218
Impotence as Ground for Divorce.....125
Imprisonment for Felony as Ground for Divorce.....142
Incompatibility of Temper as Cause for Divorce.....142
not now an Avowed Cause for Divorce..283
Indecency of Evidence must be Tolerated.....279
Indiana Declares Marriage to be a Civil Contract..... 53
Statutory Provisions Concerning Divorce..... 96
Divorces Reprobated.....229
Spurious Divorces in.....255
Incompatibility of Temper once Cause for Divorce in.....283
Injunction, Wife may Obtain.....275
Insanity as Ground for Divorce.....137
Insincerity in Bringing Divorce Proceedings.....154
Intolerable Treatment or Offering Indignities as Cause for Divorce..139
Iowa Declares Marriage to be a Civil Contract..... 53
Statutory Provisions Concerning Divorce..... 97
Italy, Ground for Divorce in.....205

J.

Jactitation of Marriage, Suit for..... 86
Jamesons', Jno. A., Judge, Opinion on Foreign Marriage and Foreign Divorce..... 157
Criticism thereon..... 188
Jewish Practice Concerning Divorce..... 72
Jews had but One Kind of Divorce..... 75
Jews, Divorce Among..... 203
Judgment Liens Created by Husband, Divested as to Wife's Land, by Decree of Divorce..... 317
Jurisdiction in Divorce Matters..... 207
Over the Subject Matter..... 207
Over the Parties..... 207
A Court's Own Declaration of Jurisdiction not Binding on Other Courts..... 215
Not Sustained by a Residence for the Mere Purpose of Obtaining a Divorce..... 215
Of Court of Another State may be Inquired into in State where a Decree is Sought to be Used..... 220
Of Foreign Court Discussed..... 220
Elaborate Rules Concerning..... 230
Where there is None, Usurpation to Act..... 233
Distinction between no, and Decree Obtained by Fraud. 234
If Court had, Intermeddler cannot Interfere..... 235
Objection to, may be taken in any way..... 235
Jurisdictional Clause should never be Omitted from Bill..... 278
Jus gentium, Law of, as to Divorce..... 248

K.

Kansas Defines Marriage to be a Civil Contract..... 53
Statutory Provisions Concerning Divorce..... 98
Kent, Definition of Marriage..... 36
Kentucky, Common Law Marriage not Good in..... 37
Statutory Provisions Concerning Divorce..... 92

L.

Laches, as to Bringing Divorce Proceedings..... 154
Law, Derivative or Unwritten..... 288
Laws, Mode of Proving those of Another Jurisdiction..... 50
Conflict of, as to Dissolving Marriage..... 69
Legislative Divorces..... 342
Action of State Concerning..... 343
Lex domicillii Governs the Status of the Person..... 214
In Connection with Divorce..... 243
As to Capacity of Parties to Contract..... 246
Party Relying on, must Aver and Prove it..... 50

Lex fori Governs as to Grounds for Granting Divorce.....247
Enforcement of Remedy.....251
Lex loci contractus, Party Relying on, must Aver and Prove it..... 50
In Connection with Divorce.....243
Governs as to Form of Marriage.....246
Lex loci delictus in Connection with Divorce.....243
Jurisdiction for Divorce in Some Places.....251
Lex loci rei sitæ Party Relying on, must Aver and Prove it..... 50
Applies as to Immovable Property..... 69
Controls as to Property.....251
Incidents of Rule of.....252
Governs as to Dower.....322
License, Statutory Provisions Concerning.....60-64
Limitation as to Bringing Divorce Proceedings.....154
Statutory in Bringing Divorce Proceedings.....155
"Lolleys" Case, Statement Concerning.....194
Louisiana, Declaration about Marriage as a Contract..... 53
Statutory Provisions Concerning Divorce..... 94
Lis pendens Applies where Property is Specifically Designated in Divorce Proceedings.....321

M.

Mahommedan, but one kind of Divorce among..... 75
Maine, Common Law Marriage not good in..... 37
Statutory Provisions Concerning Divorce..... 86
Marriage, Treated as a Peculiar and Favored Contract..... 16
It is however an Institution of Society..... 16
Treated as a Sacrament in Catholic Countries..... 17
Validity of Rites Tried by Law of Place where Celebrated 19
Held in R. I. to be One of the Marriage Relations..... 20
Has been Defined as a Public Institution..... 20
Husband, Wife and State, Parties to Marriage Contract .. 20
Origin of Marriage is Contract..... 21
Modes of Marriage among the Romans..... 21
Dowries among the Romans..... 23
Ceremony of, among the Romans..... 25
Among the Early Greeks..... 28
Among the Germans..... 29
Purchase of, by the Hebrews..... 29
By the Mosaic Law..... 30
In Lapland..... 30
In Greenland..... 30
In Iceland..... 31
Among the Tartars..... 31
Among the Circassians..... 31
Among the Chinese..... 31

Marriage, Among the Arabs 33
In Tonquin 33
In the Pelew Islands 33
Among Modern Greeks 33
First Denominated a Civil Contract by Cecrops, King of Athens 33
In the Ottoman Empire 34
In Russia 35
In Asia and Africa 35
Among the Lapps. and Finns 35
Among the American Indians 35
Made a Sacrament by Pope Innocent III 35
But Law Writers and Courts have not so Held it 35
Blackstone's Definition of 36
Reeves' Definition of (Domes. Rela.) 36
Rutherford's Definition of (Institutes) 36
Kent's Definition of 36
Bacon's Definition of 36
Florida Court's Definition of 36
How Treated in New York 36
Amount of Proof of, in Bigamy 37
Amount of Proof of, in Crim. Con 37
How to Prove Marriage 37
Contract of, *per verba de presenti* 37
Com. Law in Me., Md., Mass., N. C., Tenn., Conn., Del., Ky., N. Y 37
No Ceremony Required in Arizona 37
Mode of Marrriage *per verba de presenti* 37
Statement of Ill. Court about 37
Requisites of, in Pennsylvania 37
Common Law, Instance of 41
Children under Seven Incompetent for 42
Age of Legal Consent; 14 in Male, 12 in Female 42
Runaway 43
Evading Local Laws in Order to Marry 43
Certificate of, at Gretna Green 44
Valid at Place of Celebrating, Valid Everywhere 44
Invalid at Place of Celebrating, Invalid Everywhere 44
Sundry Requisites of 45
Concerning, by International Law 46
Definition of, as used in Christendom 47
Modes of Marriage in Foreign Countries 48
Common Law Marriage (must be by Mutual Consent of Parties) 49
New England Idea of Marriage, Divine 51
Common Law 52

Marriage, Every Intendment in Favor of..... 53
May be Proven by Reputation, Declaration and Conduct of Parties..... 53
Valid where Celebrated, Valid Everywhere as to Forms... 53
Essentials Governed by the *lex domicilii*..... 53
Contrary to *lex domicilii* is Void..... 53
Good or not, According to Place where Made 53
A Civil Contract, According to Several States..... 53
After Divorce..... 64
Validity of, Contracted beyond the State..... 65
Form of, Ceremony of..... 66
Null and Void..... 84
Suit for Jactitation of..... 86
Nullity of, Statutory Provisions Concerning..... 86
Between Chinese and Whites.....141
Indians and Whites.....141
Foreign.....157
Law of German Empire.....201
Is a Civil Status.....214
Not good without Mutual Consent.....226
Each State has Absolute Control of Status of its Citizens..227
Locus in quo of the Marriage Governs if Monogamous, Etc.248
Must Occur at only one Place and at a Single Moment of Time.....249
May be Contracted by Mail.....249
Per verba de presenti takes Place when Contract Made....249
Per verba de futuro cum copula takes Place when Sexual Contact is first had.....250
Napoleons Second, Manner of.....250
Valid where Celebrated, Valid Everywhere.....262
Void where Celebrated, Void Everywhere.....262
Certificate of, no Utility in, unless Marriage Valid.....264
Restrictions upon, in Divorce Decree, can be Evaded.....281
Void in the Several States.....335
Statutory Proceedings Concerning Divorce..... 90
Maryland, Common Law Marriage not good in..... 37
Massachusetts, Common Law Marriages not good in..... 37
Statutory Provisions Concerning Divorce..... 88
Master in Chancery, Reference of Divorce Suit to.....282
Milton on Divorce.....357
Michigan Declares Marriage to be a Civil Contract..... 53
Statutory Provisions Concerning Divorce..... 96
Minnesota Declares Marriage to be a Civil Contract..... 53
Statutory Provisions Concerning Divorce..... 97
Miscegenation as Ground for Divorce.....140
Mississippi Statutory Provisions Concerning Divorce..... 94

Missouri makes Statement about Marriage Contract..... 53
Statutory Provisions Concerning Divorce..... 96
Miscellaneous Causes for Divorce.....143
Mistake as Ground to Annul Marriage.....132
Monogamic Principle Obtains in this Country..... 68
Montana, Statutory Provisions Concerning Divorce.....100
Divorce Suits may be Tried Privately in.....281
Morality and Expediency of Divorces..... .....78 et sup.
Motions, Forms of, in Divorce Proceedings.....290

N.

Name, Wife may be Restored to Maiden or any Former.....287
Napoleon Code Allows Divorces..... 77
Napoleon's Marriage with Marie Louise..... 40
Nebraska makes Statement about Marriage as a Contract..... 53
Negatived, A Defence need not be, at first.....280
Negligence, Each Party Counts against him Alone.....262
Netherlands, Divorce Laws of.....204
Nevada Defines Marriage to be a Civil Contract.... 53
Statutory Provisions Concerning Divorce in.....100
New Brunswick, Divorce Laws of.....205
New Hampshire, Statutory Provisions Concerning Divorce..... 87
New Jersey, Statutory Provisions Concerning Divorce..... 89
New Mexico, Makes Statement about Marriage as a Contract..... 53
Statutory Provisions Concerning Divorce..... 99
New York, Requisites of Marriage in..... 36
Marriage, how Regarded in..... 36
Defines Marriage to be a Civil Contract..... 53
Statutory Provisions Concerning Divorce..... 89
North Carolina, Common Law Marriage not good in..... 37
Statutory Provisions Concerning Divorce..... 91
Nova Scotia, Divorce Laws of.....205
Noyes, Rev. John H., Lechery of.....349
Null Marriages..... 84
Nullity Effect of, of Marriage.....332
Nullity of Marriage, upon what Theory Decree of Goes.....333

O.

Oath of Defendant Should Be Waived to Answer.....280
Ohio, Statutory Provisions Concerning Divorce..... 96
Oneida Community, Creed of..... 68
Community, Lechery of.....349
Opium Habit, Not Cause for Divorce..... 131
Oregon, Defines Marriage as Merely a Civil Contract..... 53
Statutory Provisions Concerning Divorces..... 96

P.

Pagan Rule, Divorce under..... 75
Parent, Applied to Court to annul divorce of his Son: Refused.....234
Parents, Character of in reference to custody of children.....314
Parties concurring to a divorce suit.....233
Outside may avoid force of decree collaterally.....233
Are competent witnesses usually.....282
Party can only take advantage of voidable or erroneous decree by appeal, error or bill of review.....233
Party, no one but, can question a decree of divorce.....234
Pennsylvania, Common Law Marriage not in..... 37
Statutory provisions concerning divorce..... 89
Phelps, Hon. E. J. views about divorce..... 82
Place, Law of in divorce proceedings.....243
Plea to Jurisdiction of Court, in divorce cases.....275
Plea to Jurisdiction of Court in divorce cases.....271
Pleadings in divorce suit.....283
Poland, causes for divorce in.....204
Policy, as to a second marriage after spurious decree.....268
Practice, Rules about divorce.....230
Practice and Precedents in divorce cases.....271
especially in divorce suits.....277
generally uniform in all states.....281
under decree of divorce.....283
Precedents and Practice in Courts.....271
Presumptions Concerning Marriage, &c..... 49
Prince Edward's Island, Divorce Laws in.....205
Procedure, Mode of in Chicago, in Divorce Cases.....284
Prohibited Degrees, List of Parties within..... 55
Promise, Breach of Promise of Marriage.....347
Promptness Necessary in Attacking Fraudulent Judgement.....236
Necessary to Vacate Invalid Decree.....262
Proofs in a Divorce Suit.....276
Property Rights, concerning..... 68
Divorce ends all, not previously vested.....316
Divorced Wife has no right of Dower in Husband's.316
Property on Dissolution of Marriage, Wife entitled to immediate possession of.....318
Property, Court may make a division of community property.....318
Property Rights Generally.....319
Property Rights, Divorce affects such only in *lex fori*.....319
Prosecuting Attorney required to appear and defend Divorce Proceedings in several states.....145
Prosecuting Attorney must defend undefended suits in several states.281
Prudent mode of action of persons desiring second marriage after fraudulent decree.....269

Prussia, Divorce laws of....203
Publication, Effect of substituted service by....220
difference of views about decree on service by....221
New York view about decree obtained on substituted service by....222
former view of validity and force of decree obtained on notice by....223
concerning notice by....265
notice by, not of highest utility....266
about, in divorce cases....281
in an English case....274

R.

Record in divorce suit, may be impeached by evidence *aliunde*....228
Recrimination, general doctrine of....152
Reeves Domes. Rel. on marriage....36
Reform, divorce should be of causes of rather than effect....75
Religious Sect, joining as cause for divorce....142
Residence, means actual and *bona fide; animo manendi*....215
temporary, for divorce purposes, reprobated....226
required (and definition thereof) for divorce purposes....237
required for divorce in different states....238
Review, Bill of, in fraudulent divorce suits....286
Rhode Island, statutory provisions concerning divorce....88
Risks which will be taken by people in divorce matters....267
Romans, freedom of divorces among....77
Rome, Practice as to divorce in....72 et sup
Roumania, causes for divorce in....204
Runaway Marriages....43
Rutherford's Institutes: on marriage....36
Russia, causes for divorce in....204
Rule of Court in contested case....287

S.

Saxony, Divorce laws of....202
Scandal cannot be suppressed in divorce suits....282
Scotland, no divorce law for adultery prior to conjugal rights act of 1861....75
Divorce law of....196
Scottish Law Magazine, criticism of Judge Jameson's Opinion....188
Separation by acquiescence or consent, not desertion....131
when decreed, Father has right to custody of child....314
when parents live in involuntary; court considers character of parents in awarding custody of child....314
under a contract....344
under contract, Form of....345

Service of process, does not differ much in different states.....274
Shaker's practiced celibacy..... 67
"Shysters," Divorce should be avoided.....253
Sodomy, as ground for divorce 138
Solicitor's fee, motion of wife for.....275
Solon, equality of men and women by laws of, as shown by correlative rights of each for divorce..... 75
South Carolina, does not recognize divorce..... 8
Statute as to support of bastard children..... 8
Judicial approval of its recognition..... 8
Marriage likened to horse trade by Judges of..... 9
Legalized Divorces of negro legislatures..... 51
statutory provisions concerning divorce..... 92
morals and politics.....350
Spurious divorces, concerning.....255
State, duty of in regard to fraudulent divorces 267
Suit money, motion of wife for.....275
and solicitor's fees, how motion supported.....275
or costs allowed in divorce suits.....308
only necessary litigation provided for.....308
Sweden, Marriage and Divorce Laws of.....200
Switzerland, Marriage and Divorce Laws of.....199
State, has the right to declare or alter the status of its citizens.....214
State, decree of divorce in one, effect in another.....216
State, each controls status of its citizens 232
St. John, Jno. A., on divorce.....356

T.

Tennessee, Common Law, Marriage not good in..... 37
statutory provisions concerning divorce 93
special statute, interdicting cohabitation, etc 270
Texas. statutory provisions concerning divorce..... 95
Transcript of decree in a divorce suit.....283
Traveling man, about domicil of.....245
Trust and confidence, must not be abused to procure marriage 133
Turkish administration, divorce under..... 75

U.

Unchastity, *ante nuptial* no ground of divorce..... 50
Undefended divorce suits, in some States, must be defended by Prosecuting Attorney 281
Unwritten, or derivative law.....288
U. S. Consul, may perform ceremony of marriage..... 40
Utah and its divorces..... 44
statutory provisions concerning divorce 101
divorce law and practice thereunder.....207

Utah divorces, reprobated....229
as locality for fraudulent divorces....256

V.

Vermont, statutory provisions concerning divorce 87
special statute about polygamy 270
Virginia, statutory provisions concerning divorce.... 90
Void marriages.... 84
"Void," "voidable" and "nullity"....327
does not imply entire nullity....327
meaning of term....327
obscurity of definition of 327
"Void" and "voidable," distinction between 328
court may legally *declare* a marriage to be....328
an act may be void "*ab initio*" or "*expost facto*"....329
about marriages, necessity for spreading it of record.... .334
marriages in the several states ....335 to 341

W.

Washington (State), defines marriage as a civil contract merely.... 53
statutory provisions concerning divorce....101
Warrender v. Warrender, leading case of....194
Waste committed by husband on wife's lands since petition for divorce, husband must answer for....317
West Virginia, statutory proceedings concerning divorce 91
Wife may acquire separate domicil for purposes of divorce....230
rights of in spite of fraudulent divorce....265
may be restored to maiden or to any former name 287
divorce will not be granted on uncorroborated evidence of 284
demeanor and behavior will be considered concerning alimony....305
Wisconsin, statutory provisions concerning divorce.... 97
defines marriage to be a civil contract merely 53
Women, rights of....355
Wurtemberg, divorce laws of....202
Wyoming, statement concerning marriage as a contract 53
statutory provisions concerning divorce 101

Z,

Zoarites, creed of as to marriage 67

Whitefield Bowers